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SUPREME COURT, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1963

No. 449

**A QUANTITY OF COPIES OF BOOKS,
ET AL, APPELLANTS,**

vs.

KANSAS.

APPEAL FROM THE SUPREME COURT OF KANSAS

FILED SEPTEMBER 6, 1963
JURISDICTION NOTED NOVEMBER 12, 1963

SUPREME COURT OF THE UNITED STATES

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[fol. 3]

IN SUPREME COURT OF THE STATE OF KANSAS

No. 42829

STATE OF KANSAS, Appellee,

vs.

A QUANTITY OF COPIES OF BOOKS, HAROLD THOMPSON and
ROBERT THOMPSON, d/b/a P-K NEWS SERVICE, Appellants.

Appeal from the District Court of Geary County, Kansas.

Honorable A. B. Fletcher, Jr., Junction City, Kansas,
Judge.

APPELLANTS' ABSTRACT

Note: The parties will be referred to as plaintiff and intervenors as they appeared in the trial court. The transcript is in two volumes. Proceedings of August 7, 8 and 11, 1961, will be referred to as Transcript A. Proceedings of September 11, 14, and 15, 1961, will be referred to as Transcript B. Plaintiff's Exhibits 1 through 31 will be referred to as the "indicated books". Defendants' Exhibits 1 through 29 will be referred to as the "library books".

[fol. 4]

NATURE OF CASE

This is an action brought by the Attorney General on an Information and Search Warrant issued under the provisions of Chapter 186, Laws of Kansas, 1961, seeking to confiscate and destroy a quantity of books belonging to intervenors.

IN DISTRICT COURT OF GEARY COUNTY, KANSAS

No. 14,102

STATE OF KANSAS, Plaintiff,

VS.

A QUANTITY OF COPIES OF LEWD, LASCIVIOUS AND
OBSCENE BOOKS, ETC., Defendants.

INFORMATION—Filed July 25, 1961

In the name and by the authority of the State of Kansas, William M. Ferguson, the duly elected, qualified and acting Attorney General in and for said state, comes now here and gives the Court to understand and be informed that at and within the County of Geary, State of Kansas, on the 24th day of July, 1961, and prior thereto, there was and is, then and there, possessed, or kept for sale and distribution, a quantity of paper-back books, more particularly described by title in the caption hereof, at and in a building or place of business at:

The P-K News Service
340 East 9th Street
Junction City, Kansas

which books contain obscene, lewd and lascivious language and which books are, in their entirety, obscene, lewd and lascivious, manifestly tending to the corruption of the morals of any person or persons reading said books, all as prohibited by Chap. 186, Laws of Kansas, 1961, and against the peace and dignity of the State of Kansas.

Wherefore, a warrant should be issued to the Sheriff of Geary County, Kansas, directing that said prohibited books aforesaid be brought before this Court and that, after notice to the owner or agent of the owner or other person in possession and control of said prohibited books of a hearing, and after such hearing, the same be by this Court

[fol. 5] ordered publicly destroyed, by burning or otherwise, at such time as the Court shall order and satisfactory return thereof made to the Court.

IN DISTRICT COURT OF GEARY COUNTY, KANSAS

TRANSCRIPT OF PROCEEDINGS HAD ON JULY 25, 1961—
Filed July 26, 1961

The Court: This matter comes on before the Court on the 25th day of July, 1961, at 8:30 p.m. Upon information filed with the Court signed by William M. Ferguson, Attorney General of the State of Kansas, wherein the said Information states that upon belief of the said Attorney General, certain publications, i.e., paper-backed books, the same being kept for sale and distribution, fall within the purview of obscene literature as set forth in Section I, Subsection b, Chapter 186 of the Session Laws of the State of Kansas, 1961, the titles of said books being set forth in the caption of this action, and all of said books having been published as "This is an original Night Stand book". Said Information further requests the Court to view some of the said publications, and if said Court should make a finding upon reasonable belief that said books fall within the purview of said act, to issue a search warrant and to set the matter for hearing and give notice of the same as provided for in said chapter.

The Court, upon receipt of the Information, scrutinized seven volumes, they being the same but not limited to those listed in the caption of said Information, they being: "The Sinning Season"; "Backstage Sinner"; "Lesbian Love"; "Sin Hotel"; "Sin Song"; "The Wife Swappers"; and "Sex Circus". The same appear to be obscene literature as defined under Chapter 186 of the Session Laws, 1961, and give this Court reasonable grounds to believe that any paper-backed publication carrying the following: "This [fol. 6] is an original Night Stand book" would fall within the same category and would be contrary to said chapter of the Session Laws.

Based upon the Information filed herein, and the Court's scrutiny of the said books, the Court will issue a search warrant as provided for in said chapter, and set said matter for hearing for the 7th day of August, 1961, at 10:00 o'clock a.m.; and the Court so orders that said warrant be issued forthwith.

IN DISTRICT COURT OF GEARY COUNTY, KANSAS

SEARCH WARRANT AND NOTICE OF HEARING—
Filed July 27, 1961.

Whereas, an Information in writing under oath has been made to me, it appearing that there are reasonable grounds for believing that on or about the 24th day of July, 1961, at and within the City of Junction City, Geary County, Kansas, and for some time prior thereto, the exact time being unknown to this informant, there was and is possessed, or kept for sale and distribution, quantities of lewd, lascivious and obscene books, more particularly described in the caption hereof, upon the following-described premises, to-wit:

The P-K News Service
340 East 9th Street
Junction City, Kansas

in said county and in the buildings and appurtenances thereon, all of which was and is done contrary to the statutes made and provided and against the peace and dignity of the State of Kansas.

You Are, Therefore, Commanded forthwith to seize all copies of said described lewd, lascivious and obscene books and to bring said books before me at 10 o'clock A.M., on the 7th day of August, 1961, for a hearing then and there to be held to determine what further disposition shall be [fol. 7] made of such books in accordance with the order of this Court and the statutes of the State of Kansas.

You Are Further Commanded to search the above and within-described premises and buildings appurtenant there-to and to seize and take into your charge and custody all

such lewd, lascivious and obscene books, more particularly described in the caption hereof, and to keep the same subject to the terms of this warrant and then and there return this writ.

You Are Further Commanded to leave a copy of this warrant and notice of hearing with the owner of said lewd, lascivious and obscene books, or any person who may be his agent found upon said premises, and said warrant and notice of hearing shall serve as notice to the owner or owners of said books of a hearing to be had by this Court, as hereinbefore ordered, on the 7th day of August, 1961, at 10 o'clock A.M., at my Courtroom in the Courthouse, Junction City, Kansas, at which time and place said owner or owners of such books may appear and show cause why said books so seized should not be destroyed, by burning or otherwise.

Witness my official signature in said county this 25th day of July, 1961.

CERTIFICATION OF SERVICE (omitted in printing).

[fol. 8]

Case No. 14097.

The following is a list of the Titles and number of books having been published as "This is an Original Nightstand Book", seized and in my custody.

Publisher's Number	Title	Quantity Seized
1510	Born for Sin	1
1513	No longer a Virgin	76
1514	Sin Girls	77
1518	Sin Hotel	2
1519	Miami Call Girl	22
1521	Passion Trap	17
1523	Lesbian Love	6
1524	Sex Jungle	95

Publisher's Number	Title	Quantity Seized
1525	The Lustful Ones	105
1526	The Wife Swappers	39
1527	Sex Model	76
1528	The Lecher	101
1544	Lust Goddess	2
1545	Sin Camp	7
1546	\$20 Lust	12
1547	Convention Girl	7
1549	Isle of Sin	3
1550	Orgy Town	3
1551	Lover	31
1552	Sex Spy	57
1553	Trailer Trollop	27
1554	Sin Cruise	43
1555	Flesh is my undoing	57
1556	Sex Circus	27
1557	Malay Mistress	137
1559	Love Nest	90
1560	Seeds of Sin	86
1561	The Sinning Season	98
1562	Sin Song	104
1563	Passion Slave	162
1564	The Sinful Ones	145

[fol. 9]

IN DISTRICT COURT OF GEARY COUNTY, KANSAS

MOTION TO QUASH—Filed August 7, 1961

Come now the defendant books and Harold Thompson and Robert Thompson, doing business as the P-K News Service, Junction City, Kansas, owners and distributors of said books, by and through their attorneys, Hoover & Schermerhorn, and move the court to quash the Information and Search Warrant filed herein for the reason that the Information contains matter which, if true, constitutes a legal bar to the prosecution of the offense charged, namely:

The defendant books are charged in said Information to contain obscene, lewd and lascivious language and to be in their entirety obscene, lewd and lascivious manifestly tending to the corruption of the morals of any person or persons reading said books, all as prohibited by Chapter 186, Laws of Kansas, 1961.

Movants further allege that such statute on its face and as construed and applied to defendant books in this case is in violation of the Constitution of the United States and the Constitution of the State of Kansas, as hereinafter more particularly set out.

Said act on its face and as construed and applied to the books herein arbitrarily deprives these movants of their property without due process of law, denies movants equal protection of the law and freedom of speech and press, all contrary to the provisions of the 14th Amendment of the Constitution of the United States and Sections 11 and 18 of the Bill of Rights of the Constitution of the State of Kansas. The books are neither obscene, immoral, lewd or lascivious and do not contain obscene, immoral, lewd or lascivious language. The books, and each of them, are entitled to the constitutional protection afforded speech and press by the 1st and 14th Amendments to the Constitution of the United States and Section 11 of the Bill of Rights of the Constitution of the State of Kansas.

[fol. 10] Section 1 of said Act on its face and as construed and applied to defendant books in this action is too broad

in its description and classification of books to be considered within the purview of this statute. It could, and in this action did, include books which are in fact constitutionally protected expressions to the extent that said section denies to movants freedom of speech and press contrary to the 1st and 14th Amendments to the Constitution of the United States and Section 11 of the Bill of Rights of the Constitution of the State of Kansas. The definition set out in said Section 1 is too vague and does not constitute a legally recognized standard by which books, which are constitutionally protected can be segregated from those which are not and deny movants the equal protection of the law and deprive them of their property without due process of law contrary to the 14th Amendment of the Constitution of the United States and Section 18 of the Bill of Rights of the Constitution of the State of Kansas.

Section 1, subparagraph b of said Act on its face and as construed and applied to the defendant books in this case does not provide an adequate and legal standard capable of being applied by this court in determining whether the defendant books are in fact obscene or constitutionally protected and therefore deny to movants their freedom of speech and press contrary to the 1st and 14th amendments to the Constitution of the United States and Section 11 of the Bill of Rights of the Constitution of the State of Kansas, and deny movants the equal protection of the law and deprive them of their property without due process of law contrary to the 14th Amendment of the Constitution of the United States and Section 18 of the Bill of Rights of the Constitution of the State of Kansas.

Section 4 of said Act on its face and as construed and applied to the defendant books permits the seizure of books without prior notice to the owner thereof and a hearing and determination that said books are in fact obscene and subject to seizure and destruction. Under the provisions of this Section a determination that the books [fol. 11] here involved were not constitutionally protected was made by the District Judge upon an Information filed by the Attorney General of the State of Kansas, at an ex parte hearing at which plaintiff failed to present any com-

petent proof in support of the Information and Search Warrant, that such determination and the subsequent seizure of said books operates as a prior restraint on the circulation and dissemination of books, and that said section does not provide a limitation upon the time within which a judicial decision must be made on the merits of obscenity, thereby arbitrarily depriving movants of property without due process of law, denying them equal protection of law and denying them freedom of speech and press, all contrary to the 14th Amendment of the Constitution of the United States and Sections 11 and 18 of the Bill of Rights of the Constitution of the State of Kansas.

Said Act on its face and as construed and applied to defendant books in this case authorizing and requiring the seizure of said books is arbitrary and unreasonable and deprives movants of their right to be secure against unreasonable searches and seizures secured by the 4th and 14th Amendments to the Constitution of the United States, and Section 15 of the Bill of Rights of the Constitution of the State of Kansas.

IN DISTRICT COURT OF GEARY COUNTY, KANSAS

MOTION FOR CONTINUANCE—Filed August 8, 1961

Come now the defendants, and without waiving any constitutional objections to the statute under which this action was initiated or to any of the proceedings herein, moves the court for a continuance of the hearing on the merits of this action in order that defendants may have a reasonable time in which to prepare their defense. Defendants allege that the time between the date upon which the warrant herein was served on the defendants and the date set for hearing has not been adequate for a meaningful reading of [fol. 12] each of the books here in question, a research of the law involved and the securing of expert testimony relative to the merits of this action.

Defendants further move the court for an order requiring the plaintiff to return to P-K News Service all copies of

books seized under the warrant except those numbers of each title, not to exceed five of each, needed to facilitate the prosecution of this action.

IN DISTRICT COURT OF GEARY COUNTY, KANSAS

MOTION FOR JURY TRIAL—Filed September 6, 1961

Come now the defendant books and Harold Thompson and Robert Thompson, doing business as the P-K News Service, Junction City, Kansas, owners and distributors of said books by and through their attorneys, Hoover & Schermerhorn, and move the court for a jury trial of the issues presented by the Information filed herein.

In support of said motion movants allege that the test as to whether or not a particular book is obscene as set forth in the act here in question and under the decisions of the Supreme Court of the United States, and particularly as such test applies to the impact of said book upon the average person in the community as judged by the standards of common conscience of the community of the contemporary period of the violation charged can only be applied by jury duly impaneled from the citizens of that community.

Movants further allege that only by a jury trial of the essential issues herein presented can they be guaranteed the freedoms of speech and press through due process of law and equal protection of the law as provided by the First and Fourteenth Amendments to the Constitution of the United States and Sections 11 and 18 of the Bill of Rights of the Constitution of the State of Kansas.

[fol. 13]

IN DISTRICT COURT OF GEARY COUNTY, KANSAS

MEMORANDUM DECISION—Filed September 19, 1961

The sole question before the Court at this time is whether the books in question, as shown in the warrant issued by this Court, are obscene literature as defined in Chapter 186 of the Session Laws of the State of Kansas, 1961.

The test to be employed under our law is taken directly from an instruction approved by the Supreme Court of the United States in the case of *Roth vs. the United States*, which was decided together with *Albert vs. State of California* in 354, U.S., 476, 1 L. Ed., 2d, 77 S. Ct., 1304. This Court must then look to these two decisions.

The test of obscenity as laid down by the Court in the *Roth* case is as follows: "Whether to the *average* person, employing *contemporary community standards*, the *dominant theme* of the material taken as a whole appeals to *prurient interests*."

The four words or phrases italicized above form the yardstick by which these books are to be judged. The first two are impossible as to ascertainment to a certainty. The "dominant theme" of the book is antonymous to "isolated excerpts". Webster's New World Dictionary of the American Language, College Edition (1960), defines "prurient" as follows: "1. Having lustful ideas or desires. 2. Lustful, lascivious, lewd: as, prurient longings. 3. Itching."

The Court approved as a further guide the definition of obscenity in the Model Penal Code, Section 207.10 (2), as follows: "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond the customary limits of candor or representation of such matters."

This Court has further kept in mind, based upon the above decisions, that sex and obscenity are not synonymous.

[fol. 14] This Court would draw a line as between the books in question here and the books introduced by the in-

tervener, that being the purpose for which the books were written. In the case of the books introduced into evidence by the intervener, the core of the said books would seem to be the plot, with sex being subservient thereto and only acting as an agent to carry the plot to its intended conclusion, while in the books in question, the core would seem to be that of sex, with the plot, if any being subservient thereto.

This Court has made the rule of the Roth case, and the test as set forth in the law in question, operative in this case in the following manner: If the books in question showed to this Court that their dominant purpose was calculated to effectively incite sexual desires, and the Court further believed that they would have this effect on the average person residing in this community, then they are not entitled to the protection of the Amendment to the Constitution. This Court believes that the books under indictment here fall within the last statement and are not entitled to the said protection.

It Is Therefore Ordered, Adjudged, And Decreed that the books in question are found to be in violation of Chapter 186 of the Session Laws of the State of Kansas, 1961, and shall be turned over to the Sheriff of Geary County to be destroyed by said Sheriff upon the further order of this Court.

IN DISTRICT COURT OF GEARY COUNTY, KANSAS

MOTION FOR NEW TRIAL—Filed September 19, 1961

Come now intervener defendants and move the court to grant a new trial in the above-entitled cause for the following reasons:

1. Irregularities in the proceedings of the court and plaintiff, by which defendants were prevented from having a fair trial.
2. The verdict is not sustained by sufficient evidence.
- [fol. 15] 3. The verdict is contrary to the evidence.

4. The verdict is contrary to law.
5. Errors of law occurring at the trial.
6. Newly discovered evidence material for defendants, which they could not with reasonable diligence discover and produce at the trial.

IN DISTRICT COURT OF GEARY COUNTY, KANSAS

NOTICE OF APPEAL—Filed September 29, 1961

To the State of Kansas, the Above Named Plaintiff, and William M. Ferguson, Attorney General of the State of Kansas, and William D. Clement, County Attorney of Geary County, Kansas, Attorneys of Record for said Plaintiff:

Take notice that Harold Thompson and Robert Thompson, doing business as the P-K News Service, intervenor defendants, do and have appealed from the order and decision rendered and made in the above entitled action on the 11th day of August, 1961, wherein the said court overruled intervenor defendants motion to quash the Information and Search Warrant filed herein, and do further appeal from the order and decision rendered and made in the above entitled action on the 11th day of September, 1961, wherein the said court overruled intervenor defendants motion for a jury trial and a renewal of said intervenor defendants motion to quash, and further do appeal from the order and decision rendered and made on the 14th day of September, 1961, wherein said court overruled intervenor defendants demurrer to plaintiff's evidence, and do further appeal from the judgment and decision of the trial court as rendered on the 19th day of September, 1961, wherein the court held the books in question to be in violation of Chapter 186 of the Session Laws of the State of Kansas, 1961, and ordered said books to be destroyed as provided by law, and do further appeal from the judgment and order rendered and made on the 26th day of September, 1961, wherein said court overruled intervenor defendants motion

[fol. 16] for a new trial, and do further appeal from all orders, rulings and decisions made in said cause and adverse to said intervenor-defendants.

Dated this 29th day of September, 1961.

ACKNOWLEDGEMENT OF SERVICE (omitted in printing).

IN DISTRICT COURT OF GEARY COUNTY, KANSAS

JOURNAL ENTRIES—Filed January 19, 1962

On the 25th day of July, 1961, the above entitled matter came before the court on the verified information of the Attorney General for issuance of a search and seizure warrant, the state being represented by William D. Clement, County Attorney of Geary County, Kansas, and Robert E. Hoffman, Assistant Attorney General, and the matter being heard ex parte in chambers. The court having examined said information together with seven books whose titles were included as defendants in the information, and hearing the statement of counsel for the State, determined that the warrant prayed for should issue and said warrant was thereupon executed and issued directed to the Sheriff of Geary County, Kansas, to seize all copies of title as shown in said information from the premises therein described accompanying said warrant and as a part of said instrument was a notice to any who might claim ownership in the books seized or to be seized that a hearing thereon would [fol. 17] be held on the 7th day of August, 1961, as provided by law.

Thereafter and on July 29, 1961, Harold Thompson and Robert Thompson, doing business as P-K News Service, by their attorneys, Robert A. Schermerhorn and Lester Hoover of Junction City, Kansas, were permitted to intervene as owners of the books seized under the aforesaid warrant and a set of books so seized was delivered to Robert A. Schermerhorn as attorney for said interveners.

Thereafter on August 7, 1961, said matter came on for hearing and interveners filed their motion to quash the information and warrant issued herein, the state being rep-

resented by William D. Clement, County Attorney, and Robert E. Hoffman, Assistant Attorney General, and interveners being represented by their attorneys, Robert A. Schermerhorn and Lester Hoover of Junction City, Kansas.

Whereupon argument was had upon interveners' motion to quash and the court upon its own motion continued said matter to August 11, 1961, for the purpose of examining cases and authorities cited by counsel on said motion to quash and to consider his ruling upon said motion.

Whereupon the court recessed until August 8, 1961.

Thereafter on August 8, 1961, upon motion of interveners the matter was continued for hearing on the merits to September 14, 1961.

Thereafter on August 11, 1961, this matter came on for hearing, the state appearing by Robert E. Hoffman, Assistant Attorney General, and William D. Clement, County Attorney, and interveners appearing by their attorneys, Robert A. Schermerhorn and Lester Hoover of Junction City, Kansas.

Whereupon the court announced its decision upon interveners motion to quash information and search warrant by overruling said motion.

[fol.18] Thereafter on September 11, 1961, said matter came on for hearing on interveners motion for jury trial, the State appearing by Robert E. Hoffman, Assistant Attorney General, and William D. Clement, County Attorney, and interveners appearing by their attorneys, Robert A. Schermerhorn and Lester Hoover of Junction City, Kansas, and after presentation of authorities and statement of counsel, the court being fully advised in the premises overruled said motion. Intervenors thereupon again moved to quash the information and search warrant, which motion was by the court overruled.

Thereafter on September 14, 1961, said matter came on for trial, the State appearing by Robert E. Hoffman, Assistant Attorney General and William D. Clement, County Attorney, and interveners appearing by their attorneys,

Robert A. Schermerhorn and Lester Hoover, of Junction City, Kansas. Counsel for both sides having announced ready for trial the State made an opening statement, introduced its evidence and rested.

Whereupon interveners demurred to the state's evidence on the ground that the state had introduced no evidence to establish community standards. After arguments and statement of counsel, the court being fully advised in the premises overruled said demurrer.

Whereupon interveners introduced their evidence and rested.

Whereupon the court recessed until September 15, 1961.

Thereafter on September 15, 1961, the state presented its summation and arguments after which interveners presented their summation and arguments.

Whereupon the court took the matter under advisement.

Thereafter on September 19, 1961, the court having heard evidence and arguments of counsel and having been fully advised in the premises issued its memorandum decision as follows:

[fol. 19]

Memorandum Decision

The sole question before the Court at this time is whether the books in question, as shown in the warrant issued by this Court, are obscene literature as defined in Chapter 186 of the Session Laws of the State of Kansas, 1961.

The test to be employed under our law is taken directly from an instruction approved by the Supreme Court of the United States, which was decided together with *Albert vs. State of California*, in 354, U.S., 476, 1 L. Ed., 2d, 77 S. Ct., 1304. This Court must then look to these two decisions.

The test of obscenity as laid down by the Court in the Roth case is as follows: "Whether to the *average* person, employing *contemporary community standards*, the *dominant theme* of the material taken as a whole appeals to *prurient interests*."

The four words or phrases italicized above form the yardstick by which these books are to be judged. The first two are impossible as to ascertainment to a certainty. The "dominant theme" of the book is antonymous to "isolated excerpts". Webster's New World Dictionary of the American Language, College Edition (1960), defines "prurient" as follows: "1. Having lustful ideas or desires. 2. Lustful, lascivious, lewd; as prurient longings. 3. Itching."

The Court approved as a further guide the definition of obscenity in the Model Penal Code, Section 207.10 (2), as follows: "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond the customary limits of candor or representation of such matters."

This Court has further kept in mind, based upon the above decisions, that sex and obscenity are not synonymous.

[fol. 20] This Court would draw a line as between the books in question here and the books introduced by the intervener, that being the purpose for which the books were written. In the case of the books introduced into evidence by the intervener, the core of the said books would seem to be the plot, with sex being subservient thereto and only acting as an agent to carry the plot to its intended conclusion, while in the books in question, the core would seem to be that of sex, with the plot, if any, being subservient thereto.

This Court has made the rule of the Roth case, and the test as set forth in the law in question, operative in this case in the following manner: If the books in question showed to this Court that their dominant purpose was calculated to effectively incite sexual desires, and the Court further believed that they would have this effect on the average person residing in this community, then they are not entitled to the protection of the Amendment to the Constitution. This Court believes that the books under indictment here fall

within the last statement and are not entitled to the said protection,

It Is Therefore Ordered, Adjudged and Decreed that the books in question are found to be in violation of Chapter 186 of the Session Laws of the State of Kansas, 1961, and shall be turned over to the Sheriff of Geary County to be destroyed by said Sheriff upon the further order of this Court.

Albert B. Fletcher, Jr., District Judge, Second Division, Eighth Judicial District.

Thereafter on September 26, 1961, said matter came on for hearing on intervenors' motion for new trial, and the state being represented by William D. Clement, County [fol. 21] Attorney, and interveners being represented by their attorneys, Robert A. Schermerhorn and Lester Hoover of Junction City, Kansas, and after argument by counsel, the court being duly advised in the premises overruled the motion for new trial.

IN DISTRICT COURT OF GEARY COUNTY, KANSAS

SPECIFICATIONS OF ERROR

1. The trial court's ruling in overruling Interveners' Motion to Quash the Information and Search Warrant.
2. The trial court's ruling in overruling Interveners' Motion for a jury trial and the renewal of the Motion to Quash.
3. The trial court's ruling overruling Interveners' Demurrer to Plaintiff's Evidence.
4. The trial court's rulings sustaining plaintiff's objections to competent, relevant and material evidence offered by interveners.
5. The trial court's decision holding the books in question to be in violation of Chapter 186 of the Session Laws of the State of Kansas, 1961, and ordering said books to be destroyed as provided by law.

6. The trial court's ruling in overruling Interveners' Motion for a New Trial.

[fol. 22]

IN DISTRICT COURT OF GEARY COUNTY, KANSAS

EVIDENCE ON INTERVENERS' MOTION TO QUASH
AND COURT'S RULING THEREON

The Interveners at the hearing on the motion to quash the Information and Search Warrant introduced the following oral evidence:

Robert E. Hoffman, Assistant Attorney General, testified as follows:

He is an Assistant Attorney General and was so acting on July 25, 1961 (Tr. A-9). The Information was signed and verified by William M. Ferguson, Attorney General. The Attorney General had read seven titles before signing the Information (Tr. A-10), and spent nearly two weeks going over these books before the action was filed (Tr. A-11). He did not know whether the Attorney General compared these books with regularly accepted books found in this community dealing with sex themes (Tr. A-14).

He came to Junction City to file the Information on July 25, 1961, at about 5:00 P.M. He and the County Attorney went to Judge Fletcher's home, informed him of the Information (Tr. A-15) and left seven books with him (Tr. A-16). At 8:00 P.M., he, the County Attorney and Judge Fletcher met at the Court House. The Judge perused one or more of the books for a short period (Tr. A-18). These books had been reviewed and penciled references to certain sections were contained in the books. These were called to the attention of the court (Tr. A-19). The hearing lasted about 40 to 45 minutes (Tr. A-20).

[fol. 23] At this point the following question was asked:

"Q. And what took place during the 40 or 45 minutes of formal hearing?

Mr. Hoffman: Well, now, if Your Honor please, I would like to impose—interpose another objection here. There is in the records of the Court as furnished me by counsel a certified transcript of the proceedings prepared by a shorthand reporter and seems to me that that is the best evidence of what transpired. I can't see the point in going into the thing any further than the transcript shows.

Mr. Schermerhorn: If the Court please, I would take issue with Mr. Hoffman there, and I am certainly not taking issue with the Court in the preparing of the memorandum but the Court in preparing that memorandum had thoughts of his own on what should be put down there for purposes known only to the Court and at this point and at this stage of the proceedings I think these defendants have a right to inquire from the prosecuting officer just exactly what transpired at the hearing. We have a period of time of some 45 minutes here after the Court officially opened the formal hearing in chambers and I think we are entitled to know what, if any, evidence was introduced, what was done at that hearing which formed the basis for the Court's issuing of this search warrant, and I don't think we are bound to rely upon an informal memorandum,—I say 'informal' because I don't know of any requirement of the statute for it—but a memorandum which was made by the Court at that time. If there was anything else that happened, I think we are entitled to know about it.

The Court: I think the memorandum was made, Mr. Schermerhorn, for the protection of the gentlemen you represent, and I think the memorandum speaks for itself, and the objection will be sustained."

(The witness then identified seven books which were marked "Defendants' Exhibits A through G" (Tr. A-23).)

Two of the books had penciled notations and some had slips of paper in them with penciled notations, of page [fol. 24] numbers on them (Tr. A-25). The court was informed that one wouldn't have to read far to run into a descriptive passage (Tr. A-26). Mr. Ferguson, the Attorney General, has never resided in Junction City or practiced law in this area (Tr. A-28).

On cross examination Mr. Hoffman testified concerning the Attorney General's background. He was born in Kansas, has lived here all his life, practiced law in Wellington, is a former member of the Legislature, and campaigned for Attorney General in 1960. His family lived in Kansas for two or three generations. He now resides in Topeka, which is 70 miles from Junction City (Tr. A-30).

The motion to quash the Information and Search Warrant was then argued to the court and taken under advisement. On August 11, 1961, the court ruled on the motion to quash as follows:

"Gentlemen, we are here today on the Court's order that he would give his ruling as to the owners' motion to quash the Information and Search Warrant in Case No. 14,097. The court's first thinking was to write a memorandum opinion but then on second thought the Court will so state his opinion now and at this time.

"The motion, as the Court appreciates it, filed by the owners of the property seized, goes to the procedure used by this Court and to the Act itself as construed in line with the 14th Amendment of the United States Constitution and the 11th and 18th Bill of Rights of the Constitution of the State of Kansas and also the 4th and 14th Amendment to the Constitution of the United States and the 5th Article of the Bill of Rights of the State of Kansas.

[fol: 25] "The Court will consider, in reverse order, the two propositions. First, we will look to the law itself, and on its face. It has been argued here that certain safeguards are missing from the law itself, and from the cases cited it appears to this Court that the safeguards which the owners so state are missing are, judicial discretion by the Court prior to the issuance of the search warrant as to whether the material presented to the Court appears to be obscene and the search warrant should issue; second is the definiteness of the search warrant as to what is to be seized and where it is to be seized; and third that there is no ultimate time

for decision by the Court. Looking at the law itself, the Court notes in Section 4 that the law states it shall be the duty of the judge to forthwith issue his search warrant, this being subsequent to an Information or Complaint filed, verified by the informant, the county attorney, or the attorney general and based upon information and belief. This Court feels, not as argued by the owners, that it is mandatory that the Court shall issue the order for it is inherent in the Court's right in any order it shall issue whether it be a temporary injunction, an order of any type, or a search warrant, that the Court can require additional evidence or additional information to be presented to it before it so issues a search warrant or the temporary injunction or any order. Therefore, the question becomes, then, and will be discussed later by the Court, whether the Court in this case exercised judicial discretion sufficient enough to allow due process to the owners.

"The second safeguard is that the warrant be sufficient so that the one who will execute the search warrant will know what he is to pick up and where. I think we can look at the law once again and find that it states in there: '... it shall be the duty of such judge to forthwith issue his search warrant directed to the sheriff or any other duly constituted peace officer to seize and bring before said judge or justice such a prohibited item or items'. This is within the Court's judicial discretion once again as to how specific the Court shall be. This can be attacked, but in the present case we must look to what the Court did.

"Secondly—or, third, it is our view that the safeguard of ultimate decision is lacking. The Court, based upon the Kinsey Book case and the Marcus case as argued to this Court, finds that under our statute where it states: 'At such hearing, the judge or justice issuing the warrant shall determine' is different from the statute in the Marcus case wherein it stated, as the Court recalls, that the judge shall determine, not necessarily at the hearing, not necessarily at any specific time. This time then is set in our statute by the Court giving notice as of the date of hearing and this could

be attacked in due time by a motion to quash for this Court feels that a motion to quash would so reach to the date set for hearing, and if the owners so decided, this motion could be filed immediately upon the search warrant being issued and heard within three to four days, not as in this case where the owners, of their own volition, decided to wait until the date of hearing to file their motion to quash. This Court cannot, as a matter of law, say that on the face of Section 4 that it violates the due process clause of the Constitution of the State of Kansas or the right to search and seizure under the last two mentioned.

"Also attacked under the statute is the definition and test as to what is obscene. The Court has looked to *Roth v. United States* and *Alberts v. California* and believes that the test as set forth in that case is outlined in great detail in Section 1 (a) and 1 (b) of this law when in fact in the *Alberts v. California* case, as I recall, the Supreme Court said that the word 'obscene' is definite and sufficient in its meaning. In this law the legislature saw fit to go further and set forth the words which constitute the definition of prurient interest as defined in the *Roth* case. The legislature also saw fit to set forth the test in Section (b) as to the average person in the community where the test is being applied. [fol. 27] The Court feels that the test is sufficient as set forth in Section 1 (a) and (b) of Chapter 186 to meet the requirements in the *Roth* case. The Court before leaving this, would like to comment on the owners' argument as to prior restraint. It has been argued that in the case of *Near v. Minnesota* that prior restraint was exercised. I think this is true. Upon reading the case this Court concludes that the restraint was as to future publications not in existence at the time. This is the same as in the *Kinsey Book* case wherein the court did not allow his injunctive order to be effective to publications not now in existence. This Court feels that prior restraint is not as constituted under the decisions of the Supreme Court applicable here.

"The next question, did this Court in any way by its procedure violate the due process clause as to this

owner? This Court, as from the testimony and from the proceedings filed in the case, believes that it exercised judicial discretion prior to the issuance of the search warrant and believes further that this was sufficient where this Court read six—I beg your pardon—scrutinized six volumes, all bearing the same notation 'Nightstand Publication' and drew from their titles and from the notations marked in the books by the Attorney General's Office and from notations noted by this Court on its own accord that books of similar titles with similar connotations being conveyed by those titles and bearing the stamp of "Nightstand Books" fall within the same category as the six books reviewed by this Court. The Court set the matter for hearing as prescribed by law. Because the owners did not come in immediately on a motion to quash is not the fault of this Court or the law of the State. They have chosen their path and the Court is so now ruling. As to length of time when ultimate decision will be reached in this particular case, this is once again of the doing of the defendant or the owner for he has filed a motion for a continuance and in this motion he states that he is not [fol. 28] prepared to go to trial on the merits at the time set. This Court cannot say to protect the owner that you must go to trial now for the Court thinks this would be a violation of due process. Therefore, the Court feels that the procedure and act done by this Court are sufficient so as not to violate the due process clause of the Constitution of the United States or of the State of Kansas and the search and seizure clause of the same and this Court rules that the motion to quash the Information and Search Warrant shall be overruled."

IN DISTRICT COURT OF GEARY COUNTY, KANSAS

MOTION FOR JURY TRIAL AND MOTION TO QUASH
OVERRULED—September 11, 1961

The motion for a jury trial was argued to the court and overruled. Interveners then renewed their motion to quash based upon the Court's denial of their right to a jury trial which was overruled.

IN DISTRICT COURT OF GEARY COUNTY, KANSAS

SUMMARY OF PLAINTIFF'S EVIDENCE

The State, after opening statement, offered in evidence, as Plaintiff's Exhibits 1 through 31, the books in question (Tr. B-8).

Interveners objected to the introduction of evidence on the constitutional grounds urged in support of their Motion to Quash. The objection was overruled and the books admitted in evidence. (Tr. B-9).

The plaintiff then rested its case in chief, and interveners demurred to the evidence (Tr. B-9 and 10) on the ground that plaintiff had failed to introduce any evidence tending to establish the "contemporary community standards" by which the books in question should be judged (Tr. B-11). The demurrer was argued to the Court and overruled. (Tr. B-11 through 16 and 21 through 32).

[fol. 29]

IN DISTRICT COURT OF GEARY COUNTY, KANSAS

SUMMARY OF INTERVENERS' EVIDENCE

Mrs. Lois York testified in substance that she is employed as Librarian of the George Smith Public Library in Junction City, Kansas. The Library serves all of Junction City, Geary County and the adjoining Fort Riley Military Reservation. As Librarian, she selects and purchases books (Tr. B-33). In purchasing books for the Library, she uses review magazines, publisher's materials,

catalogues and newspaper services, and patrons' requests as a guide to the public's interest (Tr. B-34). All books owned by the Library are listed in a card catalog and are available to the public (Tr. B-35). In the Library you will find books containing descriptions of sexual activities and dealing with sexual deviations such as lesbianism and homosexuality, in both fiction and non-fiction (Tr. B-36).

The witness then identified the following books as property of the Public Library, and described briefly the contents of each as follows:

"Lady Chatterley's Lover", by D. H. Lawrence, dealing with an adulterous affair. (Def. Ex. 1, Tr. B-37).

"Memoirs of Hecate County", dealing with a young boy's experience with various women (Def. Ex. 2, Tr. B-38).

"The Chapman Report", by Irving Wallace (Def. Ex. 4, Tr. B-39).

"From the Terrace", by John O'Hara, complete and unabridged (Def. Ex. 5, Tr. B-40).

"Peyton Place", dealing with rape and other sexual activities (Def. Ex. 6, Tr. B-41).

[fol. 30] "Ten North Fredericks", by John O'Hara, dealing with a sexual theme (Def. Ex. 7, Tr. B-41).

"Ulysses", by James Joyce, containing descriptions and representations of sex (Def. Ex. 8, Tr. B-41).

"From Here to Eternity", by James Jones, dealing with sexual activities in Army Life (Def. Ex. 9, Tr. B-42).

"The Magic of Their Singing", by Bernard Wolfe, containing descriptions of sexual activities (Def. Ex. 10, Tr. B-42).

"A Rage to Live", by John O'Hara, containing descriptions of sexual activities (Def. Ex. 11, Tr. B-43).

"The Bramble Bush", by Morgendahl, containing representations of sexual activities (Def. Ex. 11, Tr. B-43).

"The Sot Weed Factor", by Borth (Def. Ex. 13, Tr. B-43).

"Winesburg Ohio", by Sherwood Anderson, containing sexual intimations and suggestions (Def. Ex. 14, Tr. B-44).

"God's Little Acre", by Erskine Caldwell, containing descriptions of sexual activities (Def. Ex. 15, Tr. B-44).

"The Fall of Valor", by Charles Jackson, dealing with male homosexuality (Def. Ex. 16, Tr. B-44).

"Tobacco Road", by Erskine Caldwell, containing sexual descriptions (Def. Ex. 17, Tr. B-45).

"The Grapes of Wrath", by John Steinbeck (Def. Ex. 18, Tr. B-45).

"Lolita", by Vladimir Nabokov, concerned with a juvenile nymphomaniac and a middle aged man (Def. Ex. 19, Tr. B-45).

[fol. 31] "The History of Rome Hanks", by Joseph Stanley Pennell, containing descriptions of sexual activities (Def. Ex. 20, Tr. 46).

"Candide", by Voltaire, containing sexual descriptions of a sort (Def. Ex. 21, Tr. B-46).

"Brave New World", by Aldous Huxley, containing a few sexual representations (Def. Ex. 22, Tr. B-46).

"Nana", by Emil Zola, containing representations of sex (Def. Ex. 23, Tr. B-46).

"Roxana, the Fortunate Mistress", by Daniel Defoe, containing sexual descriptions (Def. Ex. 24, Tr. B-46).

"The Satires of Juvenal", containing sexual descriptions and representations (Def. Ex. 25, Tr. B-47).

"The Satyricon of Petronius", containing descriptions of sexual activities (Def. Ex. 26, Tr. B-47).

"The Young Manhood of Studs Lonigan", by Farrell (Def. Ex. 28, Tr. B-48).

"The Song of the Red Ruby", by Mykle (Def. Ex. 29, Tr. B-48).

The witness then identified "Tropic of Cancer" by Henry Miller (Def. Ex. 38), which she wanted to purchase but

which was too expensive. She had some requests for it. This book is privately owned in this community and is available for purchase in Kansas, and throughout the country. The theme is primarily sexual (Tr. B-38 and 39).

She also identified "The World of Suzie Wong" by Richard Mason (Def. Ex. 27, Tr. B-47), a copy of which belonged to the library but was lost.

She testified further that many of these books were on "best seller" lists. Being on a best-seller list creates reader [fol. 32] interest (Tr. B-51). These books had more than average reader interest (Tr. B-52).

On cross examination Mrs. York testified she had 20,000 books in the library. The community has a population of 20,000. There are 4,200 outstanding library cards. More of these are adult cards. 6,500 to 7,000 books are checked out each month. Approximately one-half the cards are inactive (Tr. B-54). "Lady Chatterley's Lover", "Memoirs of Hecate County" and "Ulysses" were not written primarily to introduce a sexual theme to the reader (Tr. B-56, 57 and 58). Defendants' Exhibits 1 through 29 do not represent all the books in the library dealing with sexual themes (Tr. B-61). The active adult-card holders represent a cross section of the community (Tr. B-64). The request for these books (Def. Ex. 1 through 29) came from the educated class of the community (Tr. B-65). This does not mean formal education but means those who have, by reading and study, kept themselves aware of things that are going on in the world today (Tr. B-66):

Mr. Edward A. Howard testified in substance that he is employed as Librarian at the Lawrence Public Library, in Lawrence, Kansas. He has been engaged in library work eleven years (Tr. B-66). He holds a Master's degree in Library Science and is a member of the American and Kansas Library Association. The Lawrence library has 21 of the 29 books identified by Mrs. York (Def. Ex. 1 through 29) (Tr. B-67). He has read "Lady Chatterley's Lover", "The Chapman Report", "From the Terrace", "Peyton Place", "Ten North Frederick", "From Here to [fol. 33] Eternity", "Winesburg Ohio", "God's Little Acre", "Tobacco Road", "Grapes of Wrath", "Lolita", "Brave New

World", "The Young Manhood of Studs Lonigan" (Tr. B-68). He has also read 8 of the indicated books (Pl. Ex. 1 through 31), "Backstage Sinner", "Sin Song", "Love Nest", "Sin Devil", "Sinning Season", "Malay Mistress", and "The Wife Swappers", (Tr. B-68, 69). Four-letter words used in the vernacular to describe sexual organs and activities, excrement, urine, etc., are to be found in some of the best sellers owned by the library (Def. Ex. 1 through 29). None were found in the 8 volumes of the indicated books (Pl. Ex. 1 through 31), (Tr. B-69 and 70). In his opinion "Lady Chatterley's Lover", "The Chapman Report", "Peyton Place", "Lolita" and "The Young Manhood of Studs Lonigan" in description or representation of sexual activities go substantially beyond the candor found in the 8 volumes of the indicated books (Tr. B-78).

On cross examination Mr. Howard testified he is married and has two children, served as an enlisted man in the Army and is a member of the Plymouth Congregational Church (Tr. B-79). He and his family attend church regularly. Both of his grandfathers were Methodist Ministers (Tr. B-80). The 8 volumes of the indicated books which he read were furnished to him by counsel for Interveners. Most of these books had less than 200 pages (Tr. B-82). He was asked to read these books and compare them, on the basis of the statute, with other books which he had read (Tr. B-84). The first book he read was "Sin Devil". [fol. 34] He estimated some description of a sex act or reference to it occurred about every ten pages (Tr. B-85). All 8 books have the imprint "this is an original Nightstand Book" (Tr. B-86). "Lady Chatterley's Lover" contains one particular scene which is the most graphic description of sex which he has ever read (Tr. B-87). In his opinion Mr. Lawrence wrote "Lady Chatterley's Lover" with the express purpose of revealing the sex act and its importance to the lives of three of the characters (Tr. B-88). He has none of the 8 indicated books in his library nor has he had requests for them (Tr. B-88).

On re-direct examination Mr. Howard testified that each of the 8 copies of the indicated books which he read contained a plot or theme. In the case of some of these books there was a very obvious moral (Tr. B-89). In none of

these books was the exploitation of sex the sole purpose (Tr. B-90). Several passages in "Lady Chatterley's Lover" exceed in candor the descriptions of sex found in the indicated books (Tr. B-91).

On re-cross examination Mr. Howard testified in substance his opinion that "Lady Chatterley's Lover" exceeded the 8 volumes of the indicated books in the candor of description of sexual activities was based upon specific references to human genitals and to the mechanics of the sex act (Tr. B-93). Of the indicated books which he read "Wife Swappers" was the most candid, but would be difficult to compare with "Lady Chatterley's Lover" (Tr. B-92). "Wife Swappers" deals with five couples who form a club for the purpose of swapping mates. Part of the [fol. 35] book deals with the parties in which they engage and part with the introspection of the characters after such parties (Tr. B-93, 94).

Dr. Richard Lichtman testified in substance that he resides in Kansas City, Missouri, and is an Assistant Professor of Philosophy at the University of Kansas City. He holds a B.A. degree from the University of Pennsylvania and a Master's and Ph.D. degree from Yale University (Tr. B-95). For the past four years he has taught a course designated "The Foundations of World Literature". He also teaches a course in Esthetics which involves literature and problems connected with literature. His work in teaching has directed his interest to literature containing erotic passages and dealing with sex (Tr. B-95). He has read "Lady Chatterley's Lover", "Memoirs of Hecate County", "Rage to Live", "Winesburg Ohio", "God's Little Acre", "The Grapes of Wrath", "Candide", "Brave New World", "The Satyricon of Petronius", "The Young Manhood of Studs Lonigan". He has glanced through "The Chapman Report", "From the Terrace", "Peyton Place", "Ulysses", and "Lolita" (Tr. B-97). Of the indicated books he has read carefully "Backstage Sinner" and "Sin Song" and he has read selected passages from six others (Tr. B-98). In his opinion the representations and descriptions of sex in the indicated books are not so frank and descriptive as in the library books (Def. Ex. 1 through 29) (Tr. B-100). This is especially true of "Ulysses", "Lolita",

"The Memoirs of Hecate County", "Lady Chatterley's [fol. 36] Lover" (Tr. B-101, 102). Passages in "The Memoirs of Hecate County" are more descriptive in the mention of parts of the human body and the nature of the sexual act than the indicated books. In the indicated books perversions are alluded to in an indirect manner. In "Ulysses" perversions are clearly described (Tr. B-102). In his opinion descriptions of homosexuality, lesbianism, fellatio and cunnilingus are more excessive in the library books than anything found in the indicated books (Tr. B-103). In his estimation, based upon the two volumes of indicated books which he read, the interest is not in sex alone although sex is intertwined. "Backstage Sinner" for example deals with the problem of the repressions of an actress. This problem has to do with her sexual experiences. There are other areas in this novel which do not relate to sexual experiences. There are discussions of plays, methods of acting and the manner in which the director trains actresses (Tr. B-104).

On cross examination Dr. Lichtman testified in substance that he has taught four years at the University of Kansas City. He spent two years in the Army and one year teaching at Yale. He is married and originally came from New York City (Tr. B-107). One of the indicated books, "Sin Song", has a theme—an explanation of the nature of mass appeal—what makes a performer appeal to a large public audience (Tr. B-107). She represents a certain sort of hostility which attracts attention. It's not the sexuality of the girl that seems the crucial point because she loses this hostility and her career changes radically (Tr. B-108). The theme of "Sin Song" is not simply a connection of [fol. 37] sexual passages, but such passages simply make up the character of the theme. In other words the character of the hostility portrayed is as crucial to the theme as the character of the sex portrayed (Tr. B-108, 109).

It took him an hour and a half to read "Sin Song". He read two of the indicated books carefully and scanned eight. He noticed all of the indicated books had about the same number of pages and bore the inscription "This is an Original Nightstand Book" (Tr. B-109). They all contained references to the sexual act. There are descrip-

tions of sadism in "Sin Song" but in most cases they are not sexual in nature. There were no references to lesbianism, homosexuality, incest, or sex orgies (Tr. B-110). The sexual activities described in "Backstage Sinner" are heterosexual. The major concern of the author is whether the sexual experiences of the girl are satisfying to her. The possibility of pregnancy or venereal disease is never mentioned (Tr. B-112). There are passages in this book which do not stimulate sexual feeling—are non-erotic (Tr. B-113).

Mr. Joseph Rubinstein testified in substance that he lives in Lawrence, Kansas, is an assistant professor of bibliography and librarian at the University of Kansas (Tr. B-113, 114). His academic degrees are Bachelor of Arts, Master of Arts and Master of Library Science. He has been a librarian eight years and a professor eleven years (Tr. B-116). He has read the following library books (Def. Ex. 1 through 29): "Lady Chatterley's Lover", "Memoirs of Hecate County", "The Tropic of Cancer", "From the Terrace", "Ulysses", "From Here to Eternity", "Winesburg, Ohio", "God's Little Acre", "Tobacco Road", "Grapes of Wrath", "Lolita", "Nana", "Juvenal", "Petronius", and "Studs Lonigan". Of the indicated books (Pl. Ex. 1 through 31) he has read nine and scanned four or five. He has read "Love Nest", "Sin Devil", "Malay Mistress", "Sex Model", "Expense Account Sinners", "Sinning Season", "Backstage Sinner", "The Sinful Ones", and "Convention Girl" (Tr. B-115). All of the indicated books contained references to sexual activities. All of these books also contained a plot. The descriptions of sexual activities in the indicated books do not go beyond the candor of description of sexual activities found in the library books (Tr. B-116). At least three of the library books, "Lady Chatterley's Lover", "Tropic of Cancer" and "Ulysses" go a great deal farther than anything in the indicated books. "Peyton Place", "From Here to Eternity", "The Grapes of Wrath", "Juvenal" and "Petronius" in the graphic quality of writing and the intensity in which sex activities are discussed go beyond anything found in the indicated books (Tr. B-117). Specific descriptions to which he refers are to be found in "Tropic of Cancer" at the

following pages: 85, 103, 110, 119, 122, 134, 144, 158, and more; in "From the Terrace", pages 143, 171, 298, 386, 417, 572, 578, 942 and others (Tr. B-118).

Today any part of life is considered fit for literary composition and publication. This is particularly true of con-[fol. 39] temporary sex, where the dominant school is the realistic. This school makes descriptions of life as graphic and precise as possible (Tr. B-119). This candor in writing is to be found in the fields of education and moving pictures as well (Tr. B-119, 120). The library books represent this shift in literary interest (Tr. B-120).

On cross examination Mr. Rubinstein testified that all the indicated books seemed to have about 190 pages, but this is a practice of modern publishing based on printing economy (Tr. B-122). "Tropic of Cancer" has 348 pages and "Lady Chatterley's Lover", 365 pages. Descriptive passages in "Lady Chatterley's Lover" are found on pages 134, 147, 156, 204, 240, 248, 263, 297, 319 and following (Tr. B-123). He has read both the expurgated and unexpurgated editions of "Lady Chatterley's Lover". In the expurgated edition there is a story but the nucleus of the story is missing. The intended effect and strength of the story is badly damaged (Tr. B-124, 125). The same result would occur if the indicated books were expurgated. Descriptive passages are found in "Malay Mistress" on pages 6, 30, 34, 41, 63, 85 and others (Tr. B-126). The Kansas University library has 900,000 to a million books. He has never seen any of the indicated books in this library (Tr. B-127). He is not familiar with any of the authors of the indicated books (Tr. B-128).

On re-direct examination Mr. Rubinstein testified that of the library books, "Candide" has 111 pages, "The Satyricon of Petronius", 182 pages and "The Satires of Juvenal", 169 pages. In his opinion there is no relation-[fol. 40] ship between the number of pages in a book and whether it is obscene (Tr. B-129).

On examination by the court Mr. Rubinstein testified in substance that the three books just mentioned were not published by the same publisher. The library books are more realistic and use greater detail in sexual references than do the library books (Tr. B-130).

On re-cross examination Mr. Rubinstein testified he could not find the name and location of the publisher of the indicated books. Of five library books examined all identified the publisher and his address (Tr. B-132). This is general practice for commercial publishers. The University Library receives many books each year without indication of publisher (Tr. B-134). It is, however, uncommon (Tr. B-135).

CLERK'S CERTIFICATE (omitted in printing).

[fol. 48]

IN SUPREME COURT OF THE STATE OF KANSAS

No. 42,829

STATE OF KANSAS, Appellee,

vs.

A QUANTITY OF COPIES OF BOOKS, HAROLD THOMPSON and
ROBERT THOMPSON, d/b/a P-K NEWS SERVICE, Appellants.

Appeal from the District Court of Geary County, Kansas.
Honorable A. B. Fletcher, Jr., Junction City, Kansas,
Judge.

APPELLANTS' SUPPLEMENTAL ABSTRACT
IN DISTRICT COURT OF GEARY COUNTY, KANSAS
INFORMATION—Filed July 25, 1961
No. 14,097

STATE OF KANSAS, Plaintiff,

vs.

A QUANTITY OF COPIES OF LEWD, LASCIVIOUS AND OBSCENE BOOKS ENTITLED: "LOVE ADDICT", "LUST CLUB", "SEX GANG", "GANG GIRL", "CAMPUS TRAMP", "CARNIVAL OF [fol. 49] LUST", "THE WILD NIGHT", "SUMMERTIME AFFAIR", "BORN FOR SIN", "PARTY GIRL", "NAKED HOLIDAY", "THE ADULTERERS", "NO LONGER A VIRGIN", "SIN GIRLS", "PASSION SCHOOL", "SIN ON WHEELS", "SIN HOTEL", "HIGH SCHOOL SEX CLUB", "THE SIN DAMNED", "PASSION TRAP", "MIAMI CALL GIRL", "SEX JUNGLE", "THE GIRLS UPSTAIRS", "LESBIAN LOVE", "THE LECHER", "SEX MODEL", "THE LUSTFUL ONES", "THE WIFE SWAPPERS", "PASSION SHACK", "COLLEGE FOR SINNERS", "SEX CAT", "LUST GIRL", "MISTRESS OF SIN", "SEX BOMB", "THE SOUND OF LUST", "BACHELOR APARTMENT", "TRAMP", "WILD DIVORCEE", "THE TWISTED ONES", "LUST GODDESS", "SIN CAMP", "\$20 LUST", "CONVENTION GIRL", "GIRLS ON THE PROWL", "ISLE OF SIN", "SEX SPY", "LOVER", "ORGY TOWN", "SIN CRUISE", "SEX CIRCUS", "TRAILER TROLLOP", "FLESH IS MY UNDOING", "SEEDS OF SIN", "MALAY MISTRESS", "LOVE NEST", "PASSION SLAVES", "THE SINFUL ONES", "SIN SONG", "THE SINNING SEASON", each of said books having been published as "This is an original Nightstand Book", Defendants.

In the name and by the authority of the State of Kansas, William M. Ferguson, the duly elected, qualified and acting Attorney General in and for said state, comes now here and gives the Court to understand and be informed that at and within the County of Geary, State of Kansas, on the

24th day of July, 1961, and prior thereto, there was and is, then and there, possessed, or kept for sale and distribution, a quantity of paper-back books, more particularly described by title in the caption hereof, at and in a building or place of business at:

The P-K News Service
340 East 9th Street
Junction City, Kansas

[fol. 50] which books contain obscene, lewd and lascivious language and which books are, in their entirety, obscene, lewd and lascivious, manifestly tending to the corruption of the morals of any person or persons reading said books, all as prohibited by Chap. 186, Laws of Kansas, 1961, and against the peace and dignity of the State of Kansas.

Wherefore, A warrant should be issued to the Sheriff of Geary County, Kansas, directing that said prohibited books aforesaid be brought before this Court and that, after notice to the owner or agent of the owner or other person in possession and control of said prohibited books of a hearing, and after such hearing, the same be by this Court ordered publicly destroyed, by burning or otherwise, at such time as the Court shall order and satisfactory return made to the Court.

William M. Ferguson, Attorney General.

Duly sworn to by William M. Ferguson, jurat omitted in printing.

[fol. 118]

IN SUPREME COURT OF THE STATE OF KANSAS

No. 42,829

STATE OF KANSAS, Appellee,

v.

A QUANTITY OF BOOKS, HAROLD THOMPSON and ROBERT THOMPSON, d/b/a P-K NEWS SERVICE, Appellants.

SYLLABUS BY THE COURT

OBSCENITY—*Obscene Books—Destruction.* In a proceeding *in rem* for the confiscation of thirty-one named paperback books, it is determined that the said books were obscene and subject to seizure and destruction.

CONSTITUTION—*Obscenity.* Obscenity has no constitutional protection as to free speech by either the federal or state constitutions.

JURIES—*Right to Jury Trial.* There was no right to a jury trial in the above case, since there was no basis at common law for the within action.

Appeal from Geary district court; A. B. FLETCHER, JR., judge. Opinion filed March 2, 1963. Affirmed.

Robert A. Schermerhorn, of Junction City, and Stanley Fleishman, of Hollywood, California, argued the cause and C. L. Hoover and William R. King, of Junction City, were with them on the briefs for the appellants.

[fol. 119] William M. Ferguson, attorney general, argued the cause and Robert E. Hoffman, assistant attorney general, and William Clement, county attorney, were with him on the briefs for the appellee.

OPINION—March 2, 1963

The opinion of the court was delivered by

JACKSON, J.: On July 24, 1961, William M. Ferguson, attorney general of Kansas, brought an action under the new

statute which had recently been passed by the Kansas legislature in relation to obscene books and writings. He thereupon caused to be filed before the district judge in Geary county at Junction City, the county seat, an information setting out that the P-K News Service of that city had in stock and possession a quantity of paper-back books which were named in the information. We are told that the judge was given seven copies of the books for perusal before issuing the warrant for seizure. The judge's remarks about his reading of the books may be found in the transcript of the proceedings of July 25, 1961. The court did not delay in issuing the warrant under the Laws of 1961, ch. 186, sec. 4. (Now also found in G. S. 1961 Supp. 21-1102c.)

Thereafter, the sheriff of Geary county was given a search warrant and notice of hearing. Harold Thompson and Robert Thompson, owners of the P-K News Service, were given notice to appear on August 7, 1961 to determine whether the books seized were obscene. After serving the warrant, the sheriff reported and certified that he had found 1715 individual copies of the paper-back books.

On August 7, 1961, the interveners—now appellants—filed a motion to quash. The court heard arguments on this motion on August 7, and on August 11, denied the motion to quash. On August 8, the appellants moved for a continuance. This motion was granted and the court continued the case until September 14. On September 6, appellants moved that they be granted a jury trial. This was denied. Thereafter, the matter was tried to the court, and the court handed down a short memorandum opinion on September 19, 1961. We are setting out the opinion here as the clearest way of showing what the trial court thought about the case:

**"MEMORANDUM DECISION
(Filed September 19, 1961)**

"The sole question before the Court at this time is whether the books in question, as shown in the warrant issued by this Court, are obscene literature as defined in Chapter 186 of the Session Laws of the State of Kansas, 1961.

"The test to be employed under our law is taken directly from an instruction approved by the Supreme Court of the

[fol. 120] United States in the case of Roth vs. the United States, which was decided together with Albert vs. State of California in 354 U.S. 476, 1 L. Ed. 2d 1498 [*sic*], 77 S. Ct., 1304. This Court must then look to these two decisions.

"The test of obscenity as laid down by the Court in the Roth case is as follows: 'Whether to the *average* person, employing *contemporary community standards*, the *dominant theme* of the material taken as a whole appeals to prurient interests.'

"The four words or phrases italicized above form the yardstick by which these books are to be judged. The first two are impossible as to ascertainment to a certainty. The 'dominant theme' of the book is antonymous to 'isolated excerpts'. Webster's New World Dictionary of the American Language, College Edition (1960), defines 'prurient' as follows: '1. Having lustful ideas or desires: 2. Lustful, lascivious, lewd: as, prurient longings. 3. Itching.'

"The Court approved as a further guide the definition of obscenity in the Model Penal Code, Section 207. 10(2), as follows: 'A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i. e., shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond the customary limits of candor or representation of such matters.'

"This Court has further kept in mind, based upon the above decisions, that sex and obscenity are not synonymous.

"This Court would draw a line as between the books in question here and the books introduced by the intervener, that being the purpose for which the books were written. In the case of the books introduced into evidence by the intervener, the core of the said books would seem to be the plot, with sex being subservient thereto and only acting as an agent to carry the plot to its intended conclusion, while in the books in question, the core would seem to be that of sex, with the plot, if any being subservient thereto.

"This Court has made the rule of the Roth case, and the test as set forth in the law in question, operative in this case in the following manner: If the books in question showed this Court that their dominant purpose was calculated to effectively incite sexual desires, and the Court further believed that they would have this effect on the average

person residing in this community, then they are not entitled to the protection of the Amendment to the Constitution. This Court believes that the books under indictment here fall within the last statement and are not entitled to the said protection.

"It Is Therefore Ordered, Adjudged, and Decreed that the books in question are found to be in violation of Chapter 186 of the Session Laws of the State of Kansas, 1961, and shall be turned over to the Sheriff of Geary County to be destroyed by said sheriff upon the further order of this Court."

Appellants have now appealed to this court and are asserting all of the matters urged to the trial court.

Turning to the statute (G. S. 1961 Supp. 21-1102a) we readily see that the first section contains a definition of obscenity. We believe that the test for obscenity which is provided is adequate and we are applying it in this case.

[fol. 121] It would seem that the vital question is whether these seized books were in fact obscene. The test for obscenity is not easy to state. It is said that Irvin S. Cobb was once called as an expert witness in a case of claimed obscenity. He was asked to give a definition of obscenity. His answer was: "If the depth of the dirt exceeds the breadth of the wit, then in my opinion the book is obscene."

Appellants argue that there was no evidence showing comparison of the seized books with other books in common circulation. The trial court did point out the difference between the seized books and some twenty-nine others that were taken from the Junction City public library.

The attorney general's brief contains a section in which each of the thirty-one seized books is listed by name and then the pages upon which obscenities occur are given along with a short description. We have checked the cited pages and find that they well bear out the descriptions. We would certainly agree that the books as a whole come within the definition found in paragraph 4 of the syllabus in *Roth v. United States*, 354 U. S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304, where it is said:

"(a) Sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner ap-

pealing to prurient interest—i. e., material having a tendency to excite lustful thoughts.” (p. 477)

We are of the opinion that the seized books are in fact hard core pornography. We feel certain that young G. I.'s from Fort Riley—many of whom frequent Junction City—would be of the same opinion. We believe that the seized books are obscene by the definition found in the Roth case, or by the definition found in the statute or by any other definition.

We shall now answer briefly certain other matters. First of all, obscenity is not protected by the First Amendment to the Constitution of the United States nor is it protected by the due process clause of the Fourteenth Amendment nor, of course, under section 11 of our own Bill of Rights to the Constitution of Kansas, see *Roth v. United States*, supra.

The present case is not a criminal case but a civil case. The appellants are claiming that they had a right to a jury trial. If that were true, appellants would have to point out what form of action at common law formed the basis for the present suit. Both the provision in section 5 of the [fol. 122] Bill of Rights of the state constitution which reads: “The right of trial by jury shall be inviolate” and Amendment VII of the federal constitution preserve only the right of trial by jury as it existed at common law. This action grows out of a statute, and we know of no basis for it at common law. Therefore, there was no right to a jury trial.

We believe that the currently seized books are only attempts to carry pornography to the “nth” degree; that smut and obscenities seem to be the chief purpose of the books; that the story—what there is of it—is simply a framework upon which to hang the pornography. Certainly there is no literary merit in the thirty-one books seized. They are trash.

Having considered all matters raised in this case, the order will be made to affirm the trial court's ruling. It is so ordered.

PRICE and ROBB, JJ., dissent.

[fol. 123]

IN SUPREME COURT OF THE STATE OF KANSAS

[Title omitted]

MOTION BY APPELLANTS FOR REHEARING

Harold Thompson and Robert Thompson, d/b/a P-K News Service, appellants, move the Court for an order setting aside the decision and judgment of the Court made and entered in the above entitled action on the 2nd day of March, 1963, and to grant a rehearing thereof for the reason that the appellants feel aggrieved by the said decision and judgment as pronounced for the following reasons:

1. The statute, Chapter 186 of the Laws of Kansas, 1961, on its face and as construed and applied by the trial court abridges interveners' freedom of speech and press, deprives them of due process and also denies them their right to be secure from unlawful search and seizure, contrary to the first, fourth and fourteenth amendments to the Constitution of the United States (Marcus vs. Search Warrants, 367 U. S. 717, 81 S. Ct. 1708).

2. The statutes as construed and applied by the trial court finding the books obscene without evidence they exceed customary limits of candor and appeal to prurient interests is unconstitutional, in violation of the first and fourteenth amendments to the Constitution of the United States. (Roth vs. United States, 354 U. S. 476, 77 S. Ct. 1304; Manual Enterprises vs. Day, 82 S. Ct. 1432).

3. The statute on its face and as construed and applied by the trial court, by reason of the absence of a provision for jury trial violates the first and fourteenth amendments to the Constitution of the United States.

4. The statute on its face and as construed and applied by the trial court is unconstitutional because it is too broad in definition, does not provide a real standard by which to judge and does not contain the element of scienter, contrary to the first and fourteenth amendments to the Constitution of the United States.

5. The books are not obscene when judged by the evidence under the standard approved in *Roth-Alberts and Manual Enterprises, Inc.* and the Court's decision condemning them violates the provisions of the first and fourteenth amendments to the United States Constitution.

6. It further appears from the opinion that this court in concluding that the books here in question are legally obscene has used the *Hicklin* test which has been rejected by the United States Supreme Court, and is contrary to the first and fourteenth amendments to the Constitution of the United States (*Roth vs. United States*, 354 U. S. 476).

[fol. 124] Appellants also request the court to allow oral argument on this motion if deemed proper.

Stanley Fleishman, 1680 Vine Street, Hollywood, California, C. L. Hoover, Robert A. Schermerhorn, 811 North Washington Street, Junction City, Kansas, Attorneys for Appellants.

PROOF OF SERVICE (omitted in printing).

[fol. 125]

IN SUPREME COURT OF THE STATE OF KANSAS

[Title omitted]

**MOTION BY APPELLANTS FOR ORDER STAYING ISSUANCE AND
TRANSMISSION OF MANDATE**

Come now the appellants by and through Robert A. Schermerhorn, one of their attorneys, and moves the Court for an order staying issuance and transmission of the mandate in the above entitled appeal in the event the motion for rehearing filed this date is denied and the decision and judgment of this Court made and entered on the 2nd day of March, 1963, is re-affirmed.

In support of said motion appellants allege that they have instructed their counsel to prepare an appeal or a petition for a writ of certiorari to be filed in the Supreme Court of the United States and that it is their intention to have

such appeal or a petition for a writ of certiorari prepared and filed within the time allowed by law.

Robert A. Schermerhorn, 811 North Washington Street, Junction City, Kansas, Attorney for Appellants.

PROOF OF SERVICE (omitted in printing).

[fol. 126]

IN SUPREME COURT OF THE STATE OF KANSAS

Topeka

[Title omitted]

JOURNAL ENTRY DENYING MOTIONS FOR REHEARING AND FOR STAY ORDER—April 15, 1963

Motion by appellants for Rehearing is Denied. Motion by appellants to stay issuance and transmission of mandate is Denied.

[fol. 127]

IN SUPREME COURT OF THE STATE OF KANSAS

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed July 9, 1963

I

Notice is hereby given that Harold Thompson and Robert Thompson doing business as P-K News Service, owners of A Quantity of Copies of Books here involved, the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Kansas affirming the order, judgment and decree of a judge of the District Court of Geary County [fol. 128] in the State of Kansas, which found that 31 named books and a quantity of copies thereof were obscene in violation of Chapter 186 of the Session Laws of the

State of Kansas, 1961, and should be turned over to the Sheriff of Geary County to be destroyed by said Sheriff upon the further order of the Court.

This appeal is taken pursuant to 28 USC, §1257(2).

II

The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Appellants' Abstract, which includes:

- (a) Nature of Case.
- (b) Information.
- (c) Search Warrant and Notice of Hearing.
- (d) Motion to Quash.
- (e) Motion for Continuance.
- (f) Motion to Amend Return.
- (g) Order to Amend Return.
- (h) Motion for Jury Trial.
- (i) Memorandum Decision.
- (j) Motion for New Trial.
- (k) Notice of Appeal.
- (l) Journal Entry.
- (m) Specifications of Error.
- (n) Evidence on Interveners' Motion to Quash.
- (o) Plaintiff's Evidence.
- (p) Interveners' Evidence.

[fol. 129] 2. Appellants' Supplemental Abstract and Brief, which includes:

- (a) Information.
- (b) Brief.

3. All Exhibits in evidence.
4. Opinion of the Kansas Supreme Court, including syllabus by the Court.
5. Judgment.
6. Motion for Rehearing.
7. Motion for Order Staying Issuance and Transmission of Mandate.
8. Order Denying Motion for Hearing.
9. Order Denying Motion for Stay of Issuance and Transmission of Mandate.
10. This Notice of Appeal to the Supreme Court of the United States.
11. Transcript of Proceedings—2 volumes.

III

The following questions are presented by this appeal:

1. Whether the statute (Chapter 186, Laws of Kansas, 1961), on its face, and as construed and applied herein to authorize the search for and seizure of the books herein involved, deprived appellants of their right to be secure against unreasonable searches and seizures guaranteed to appellants by the provisions of the Fourth Amendment to the Constitution of the United States, subsumed into the due process provisions of the Fourteenth Amendment to the Constitution of the United States as a limitation upon state action.

2. Whether the statute (Chapter 186, Laws of Kansas, 1961), on its face, and as construed and applied herein to [fol. 130] authorize the search for and seizure of the books herein involved, constituted a prior restraint on the circulation of the publication involved herein and resulted in an abridgment of the exercise of freedoms of speech and press, all protected by the provisions of the First Amendment to the Constitution of the United States incorporated into the due process provisions of the Fourteenth Amendment to

the Constitution of the United States as a protection against state action.

3. Whether the statute (Chapter 186, Laws of Kansas, 1961), on its face, and as construed and applied herein to authorize the search for and seizure of the books herein involved, in judging the alleged obscenity of the books solely by the standards of the community of Junction City, Kansas, abridged appellants' exercise of freedoms of speech and press guaranteed by the provisions of the First Amendment to the Constitution of the United States incorporated into the due process provisions of the Fourteenth Amendment to the Constitution of the United States as a limitation upon state action.

4. Whether the statute (Chapter 186, Laws of Kansas, 1961), on its face, and as construed and applied herein to authorize the search for and seizure of the books herein involved, by reason of the absence of a provision for a jury trial of the essential issues thereunder and a denial of the said jury trial in the cause herein, despite the requests of the appellants duly made, renders the statute unconstitutional because the statute thus arbitrarily abridges appellants' exercise of freedoms of speech and press, and deprives appellants of their liberty without due process of [fol. 131] law, and denies appellants the equal protection of the laws contrary to the free speech, due process and equal protection provisions of the First and Fourteenth Amendments to the United States Constitution.

5. Whether the statute (Chapter 186, Laws of Kansas, 1961), on its face, and as construed and applied herein to authorize the search for and seizure of the books herein involved, without proof that the books go substantially beyond customary limits of candor in the description or representation of matters pertaining to sex and nudity and without proof in addition that the books appeal to the prurient interest of the average person, abridges appellants' exercise of freedoms of speech and press, arbitrarily deprives appellants of liberty and property without due process of law, discriminatorily deprives appellants the equal protection of the laws, all in violation of the free speech,

due process and equal protection provisions of the First and Fourteenth Amendments to the United States Constitution.

6. Whether the statute (Chapter 186, Laws of Kansas, 1961), on its face, and as construed and applied herein to authorize the search for and seizure of the books herein involved, abridges appellants' exercise of freedoms of speech and press guaranteed by the provisions of the First Amendment to the Constitution of the United States, subsumed into the due process provisions of the Fourteenth Amendment to the Constitution of the United States as a limitation upon state action.

7. Whether the statute (Chapter 186, Laws of Kansas, 1961), on its face, and as construed and applied herein to authorize the search for and seizure of the books herein [fol. 132] involved, by failing to provide any ascertainable standards under which men of common intelligence could know what is or is not permissible; by failing to contain any requirement of scienter; by authorizing the seizure and suppression of books without any proof in the record that the books exceeded contemporary standards or appealed to the prurient interest of the average person, the record in fact showing that the books did not; by failing to provide for a jury trial on the essential issues, all operated to deprive appellants of their freedoms of speech and press, their liberty and property without due process of law and denying appellants the equal protection of the laws, in violation of the free speech, due process and equal provisions of the First and Fourteenth Amendments to the Constitution of the United States.

8. Whether the statute (Chapter 186, Laws of Kansas, 1961), on its face, and as construed and applied herein to authorize the search for and seizure of the books herein involved, in holding that the said books were obscene and should be suppressed and destroyed, abridges appellants' exercise of freedoms of speech and press, deprives appellants of their liberty and property without due process of law and denies appellants the equal protection of the laws, in violation of the free speech, due process and equal pro-

visions of the First and Fourteenth Amendments to the Constitution of the United States.

Stanley Fleishman, 1680 Vine Street; Room 700,
[fol. 133] Hollywood 28, California; C. L. Hoover,
Robert A. Schermerhorn, 811 North Washington
Street, Junction City, Kansas, Attorneys for Ap-
pellants.

[fol. 134] PROOF OF SERVICE (omitted in printing).

[fol. 135]

OFFICE OF CLERK OF THE SUPREME COURT

Topeka, Kansas, July 9, 1963

Dear Sir:

I have today received and filed Notice of Appeal to the Supreme Court of the United States in case No. 42,829, State of Kansas v. Thompson, et al., and proof of service of same.

Very respectfully,

JAMES R. JAMES

Clerk of the Supreme Court

Aug. 26, 1963—Rec'd

[fol. 136] CLERK'S CERTIFICATE TO FOREGOING TRANSCRIPT
(omitted in printing).

[fol. 137]

SUPREME COURT OF THE UNITED STATES

No. 449, October Term, 1963 ,

A QUANTITY OF COPIES OF BOOKS, et al., Appellants,

vs.

KANSAS.

ORDER NOTING PROBABLE JURISDICTION—November 18, 1963

Appeal from the Supreme Court of the State of Kansas.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

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IN THE
Supreme Court of the United States

October Term, 1963

No.

A Quantity of Copies of Books, HAROLD THOMPSON
and ROBERT THOMPSON, dba P-K NEWS SERVICE,

Appellants,

vs.

STATE OF KANSAS,

Appellee.

On Appeal From the Supreme Court of the
State of Kansas.

JURISDICTIONAL STATEMENT.

Appellants appeal from the judgment of the Supreme Court of the State of Kansas entered on March 2, 1963, rehearing denied April 15, 1963, notice of appeal filed July 9, 1963, affirming the order, judgment and decree of a Judge of the District Court in and for the County of Geary, State of Kansas directing that certain books be turned over to the Sheriff of Geary County to be destroyed by the said Sheriff because found by the said Judge of the District Court to be in violation of the laws of the State of Kansas.

Opinions Below.

The opinion of the Supreme Court of the State of Kansas [R. 118-122]¹ was divided, two Justices dissenting without opinion [R. 122]. The opinion is reported in 191 Kan. 13, 379 P. 2d 254. A copy of the opinion is attached hereto as Appendix A. The memorandum decision of the District Judge [R. 19-20] is unreported but is embodied at length in the aforesaid opinion of the Supreme Court of the State of Kansas attached hereto as Appendix A.

Jurisdiction.

This was an *in rem* proceeding instituted under the laws of Kansas (G. S. 1961 Supp. 21-1102 to 21-1102c, L. 1961, ch. 186, June 30) seeking the public destruction "by burning or otherwise" [R. 50] of certain specified books alleged to be "obscene, lewd and lascivious, manifestly tending to the corruption of the morals of any person or persons reading said books" [R. 50]. The judgment of the Supreme Court of the State of Kansas [R. 122] was entered on March 2, 1963 [R. 118], a due and timely motion for rehearing was denied on April 15, 1963 [R. 126], and notice of appeal was due and timely filed in the Supreme Court of the State of Kansas on July 9, 1963 [R. 127-135]. The jurisdiction of the Supreme Court to review this judgment rests upon 28 U. S. C. 1257(2). The judgment upheld the state statute against claims that on its face and as applied, the statute violated the Federal Constitution. The following decisions sustain the jurisdiction of the Su-

¹The reference "R" is to the transcript of the record prepared and certified by the Clerk of the court below and on file in this Court.

preme Court to review the judgment on direct appeal in this case: *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58; *Marcus v. Search Warrant*, 367 U. S. 717; *Kingsley Books, Inc. v. Brown*, 354 U. S. 436; *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282.

Questions Presented.

1. Whether the statute (G. S. 1961 Supp. 21-1102 to 21-1102c, L. 1961, ch. 186, June 30), on its face and as construed and applied, by reason of the absence of a provision for a jury trial of the essential issues thereunder, and by reason of a denial of a jury trial in the cause herein despite appellants' requests duly made, renders the statute unconstitutional because the statute, on its face and as so construed and applied, abridges appellants' exercise of freedoms of speech and press, arbitrarily deprives appellants of their liberty and property without due process of law, and discriminatorily denies appellants the equal protection of the laws contrary to the free speech and press, due process and equal protection provisions of the First and Fourteenth Amendments to the United States Constitution.
2. Whether the statute (G. S. 1961 Supp. 21-1102 to 21-1102c, L. 1961, ch. 186, June 30), on its face, and as construed and applied to authorize the search and seizure of the books herein involved, constitutes a prior restraint on the circulation of books including the books involved herein, thereby abridging the exercise of freedoms of speech and press including appellants' exercise thereof, all protected by the free speech and press provisions of the First Amendment and the due process clause of the Fourteenth Amendment to the Constitution of the United States.

3. Whether the statute (G. S. 1961 Supp. 21-1102 to 21-1102c, L. 1961, ch. 186, June 30), on its face, and as construed and applied to authorize the search and seizure of the books herein involved, deprives appellants of the right to be secure against unreasonable searches and seizures protected by the provisions of the Fourth Amendment and the due process clause of the Fourteenth Amendment to the Constitution of the United States.

4. Whether the statute (G. S. 1961 Supp. 21-1102 to 21-1102c, L. 1961, ch. 186, June 30), as construed and applied to authorize the search, seizure and destruction of the books herein involved by applying solely the contemporary standards of the community of Junction City, Kansas in judging the alleged obscenity of the books, abridges appellants' exercise of freedoms of speech and press protected by the free speech and press provisions of the First Amendment and the due process clause of the Fourteenth Amendment to the Constitution of the United States.

5. Whether the statute (G. S. Supp. 21-1102 to 21-1102c, L. 1961, ch. 186, June 30), as construed and applied to authorize the search, seizure and destruction of the books herein involved without proof that the books go substantially beyond customary limits of candor in the description or representation of matters pertaining to sex and nudity and without proof in addition that the books appeal to the prurient interest of the average person, abridges appellants' exercise of freedoms of speech and press, arbitrarily deprives appellants of liberty and property without due process of law, and discriminatorily deprives appellants of the equal protection of the laws, all in violation of the free speech and press provisions of the First Amendment and the due

process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

6. Whether the statute (G. S. 1961 Supp. 21-1102 to 21-1102c, L. 1961, ch. 186, June 30), on its face, and as construed and applied to authorize the search, seizure and destruction of the books herein upon the ground that the books violate the statute, abridges the exercise of freedoms of speech and press including appellants' exercise thereof, protected by the free speech and press provisions of the First Amendment and the due process clause of the Fourteenth Amendment to the Constitution of the United States.

7. Whether the statute (G. S. 1961 Supp. 21-1102 to 21-1102c, L. 1961, ch. 186, June 30), on its face, and as construed and applied, by failing to provide any ascertainable standards under which men of common intelligence can know what is or is not permissible; by failing to contain any requirement of scienter; by failing to provide for a jury trial and the denial of a jury trial duly requested by appellants; by authorizing a prior restraint on the circulation of books, including the books herein; by authorizing the search and seizure of books, including the books herein; by authorizing the search, seizure and destruction of the books herein involved, applying solely the contemporary standards of Junction City, Kansas, without any evidence that the books substantially exceed limits of candor in the description or representation of sex or nudity or appeal to the prurient interest of the average person, the uncontradicted record in fact showing that the books do not; and by ordering the destruction of the books as allegedly obscene in violation of the statute, all operates and operated to deprive appellants of freedoms of speech and press, arbitrarily

to deprive appellants of liberty and property without due process of law, and discriminatorily to deny appellants the equal protection of the laws, all in violation of the free speech and press provisions of the First Amendment, the search and seizure provisions of the Fourth Amendment, and the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fourth and Fourteenth Amendments to the Constitution of the United States, and the pertinent provisions of the General Statutes of Kansas (G. S. 1961, Supp. 21-1102, 21-1102c, L. 1961, ch. 186, sections 1, 4, June 30) are attached hereto as Appendix B.

Statement of the Case.

On July 25, 1961, an information, verified by William M. Ferguson, Attorney General of the State of Kansas, was filed in the District Court of Geary County, Kansas [R. 48-50]. The caption of the information was entitled in the name of the State, as plaintiff, against, a quantity of books, the specific titles of each of the books, fifty-nine in number, being set forth in the caption, together with the statement that each of the specified books had been published as "This is an original Night Stand Book" [R. 48-49]. The information alleged that P K News Service, located at 340 East 9th Street, Junction City, Kansas, possessed for sale and distribution on July 24, 1961, a quantity of paper-back books, "more particularly described by title in the caption hereof" [R. 49], which books allegedly contained "obscene, lewd and lascivious" lan-

guage and which books were in their entirety allegedly "obscene, lewd and lascivious, manifestly tending to the corruption of the morals of any person or persons reading said books" [R. 50], all as allegedly prohibited by the specified laws of Kansas.

The prayer of the information was that a warrant issue to the Sheriff of Geary County, Kansas, directing that the books be brought before the Court and that, after notice to the owner or other person in possession and control of said books of a hearing, and after such hearing, that the Court order the books publicly destroyed, by burning or otherwise [R. 50].

The information aforesaid having been executed by the Attorney General, an Assistant Attorney General was sent with the information for filing in Junction City, Kansas [R. 22]. On July 25, 1961, the information was filed in the District Court of Geary County, Kansas at about 5:00 P.M. [R. 22]. The Assistant Attorney General, accompanied by the County Attorney, then proceeded to the home of the Honorable Albert B. Fletcher, a Judge of the said Geary district Court, informed him of the information, and left seven books with him [R. 22].

At about 8:00 P.M. [R. 22] or 8:30 P.M. [R. 5], Judge Fletcher, the Assistant Attorney General and County Counsel met at the Court House [R. 22]. The Court's attention was called to certain pencilled references to certain sections in the seven books [R. 22]. Two of the seven books had pencilled notations and some had slips of paper in them with pencilled notations of page numbers on them [R. 23-24]. The Judge perused one or more of the books for a short period [R. 22]. The hearing lasted about 40 to 45 minutes [R. 23].

Judge Fletcher stated, on the said July 25, 1961, that he had "scrutinized seven volumes" [R. 5]—six listed in the information, while one was not—and concluded as follows:

"The same appears to be obscene literature as defined under Chapter 186 of the Session Laws, 1961, and give this Court reasonable grounds to believe that any paper-backed publication carrying the following: 'This is an original Night Stand Book' would fall within the same category and would be contrary to said chapter of the Session Laws," [R. 5-6].

Based upon "the Information" and "the Court's scrutiny" [R. 6] of the said seven books, Judge Fletcher held that a search warrant should issue forthwith, and the Court set the matter for hearing for "the 7th day of August, 1961" [R. 6].

Thereupon, on the said July 25, 1961, a search warrant issued [R. 6-7]. The warrant recites that it appears from the Information that "quantities of lewd, lascivious and obscene books, more particularly described in the caption hereof" [R. 6] are possessed for sale and distribution at the specified address, and the command of the warrant is "forthwith to seize all copies of said described lewd, lascivious and obscene books and to bring said books before me at 10 o'clock A.M. on the 7th day of August, 1961, for a hearing then and there to be held to determine what further disposition shall be made of such books" [R. 6-7]. The command was further to search the premises and buildings for such books as aforestated [R. 7], and to leave a copy of the warrant and notice with the owner of the books, or with any agent on the premises, notifying the owner of the

hearing date on August 7, 1961, at which time the owner might show cause why the books seized should not be destroyed, by burning or otherwise [R. 7].

Accordingly on the next day, July 26, 1961, the search warrant was executed by searching the premises and seizing 1,715 books, being copies of 31 different titles [R. 7]. A copy of the warrant and notice of hearing was left with the bookkeeper at the P-K News Service premises [R. 7]. The return of the officer who executed the warrant recites: "The following is a list of the Titles and number of books having been published as 'This is an Original Nightstand Book,' seized and in my custody" [R. 8], followed by a list of the books containing the Publisher's number, the title of each book, and the quantity seized [R. 8].

• How Federal Questions Are Presented.

On August 7, 1961, appellants filed their motion to quash the search warrant and Information [R. 9-11]. The grounds of the motion were that the statute on its face and as construed and applied to the books involved were in violation of the state and Federal constitutions [R. 9]; that the statute, on its face and as construed and applied, deprived appellants of their property without due process of law, denied them the equal protection of the laws and freedoms of speech and press, "all contrary to the provisions of the 14th Amendment of the Constitution of the United States and Sections 11 and 18 of the Bill of Rights of the Constitution of the State of Kansas" [R. 9]; that the books are not obscene, immoral, lewd or lascivious, nor contain such language, and were entitled to constitutional protection under the "1st and 14th Amendments to the Constitution of

the United States and Section 11 of the Bill of Rights of the Constitution of the State of Kansas" [R. 9].

It was further urged in the motion to quash that the statute failed to provide ascertainable standards, and that the breadth of the statutory language encompassed constitutionally protected books, and the statute therefore, on its face and as construed and applied, abridged freedoms of speech and press, deprived appellants of their property without due process of law and denied them the equal protection of the laws, all in violation of "the 14th Amendment of the Constitution of the United States and Section 18 of the Bill of Rights of the Constitution of the State of Kansas" [R. 8].

The motion also asserted that the statute permitted the seizure of books without prior notice to the owner and without hearing or determination that the seized books are obscene; that the procedures employed to seize the books herein involved operate "as a prior restraint on the circulation and dissemination of books" [R. 11]; that the statute does not provide a limitation upon the time within which a judicial decision must be made on the issue of obscenity, thereby arbitrarily depriving appellants of property without due process of law, denying them equal protection of the laws and freedom of speech and press, "all contrary to the 14th Amendment of the Constitution of the United States and Sections 11 and 18 of the Bill of Rights of the State of Kansas" [R. 11].

Finally, the motion to quash asserted that the statute on its face and as construed and applied to the books involved authorizing and requiring the seizure of the books is arbitrary and unreasonable and deprives appellants of their right to be secure against unreason-

able searches and seizures "secured by the 4th and 14th Amendments to the Constitution of the United States, and Section 15 of the Bill of Rights of the Constitution of the State of Kansas" [R. 11].

Following the filing of the said motion to quash on August 7, 1961, and on the same day, a hearing was held where appellants introduced evidence with respect to the manner in which the Information was executed and filed on July 25, 1961) the nature of the proceedings before Judge Fletcher on the same day in the evening; and identified the seven books which the court had scrutinized prior to the issuance of the search warrant, all as aforestated [R. 22-24]. Following oral argument, the court took the matter under advisement [R. 24].

On August 11, 1961, the Court ruled on the motion to quash [R. 24-28]. The District Court stated at the outset that the motion "goes to the procedure used by this Court and to the Act itself as construed in line with the 14th Amendment of the United States Constitution and the 11th and 18th Bill of Rights of the Constitution of the State of Kansas and also the 4th and 14th Amendment to the Constitution of the United States and the 5th Article of the Bill of Rights of the State of Kansas" [R. 24]. The Court held that the statute on its face did not deprive appellants of due process of law nor act as a prior restraint on the dissemination of publications [R. 26-27].

The court stated that due process was not violated by the procedures used to seize the books; that there was basis for the exercise of judicial discretion prior to the issuance of the search warrant when the court "read six—I beg your pardon—scrutinized six volumes,

all bearing the same notation 'Nightstand Publications' [R. 27], and the District Court concluded "that the procedure and act done by this Court are sufficient so as not to violate the due process clause of the Constitution of the United States or of the State of Kansas and the search and seizure clause of the same, and the Court rules that the motion to quash the Information and Search Warrant shall be overruled" [R. 28].

Prior to the ruling of the court on the motion to quash on August 8, 1961, appellants moved the court for a continuance of the hearing on the merits in order to have a reasonable time to prepare their defense [R. 11-12], and thereupon the matter was continued for hearing on the merits to September 14, 1961 [R. 17].

On September 6, 1961, appellants filed a motion for jury trial [R. 12]. The appellants alleged that the standards for judging obscenity could only be applied by a jury, that "only by a jury trial of the essential issues herein presented can they be guaranteed the freedoms of speech and press through due process of law and equal protection of the law as provided by the First and Fourteenth Amendments to the Constitution of the United States and Sections 11 and 18 of the Bill of Rights of the Constitution of the State of Kansas" [R. 12].

On September 11, 1961, argument on appellants' motion for a jury trial was held, and the motion was on the said day overruled [R. 18]. Appellants renewed their motion to quash, and the said motion was also overruled [R. 18].

On September 14, 1961, the matter came on for trial [R. 18] before the said Honorable Albert B. Fletcher, a Judge of the District Court for Geary County,

Kansas. The State offered into evidence [R. 28] as Plaintiff's Exhibits 1 through 31, the books in question [R. 6]. Appellants objected to the introduction of the evidence on the constitutional grounds urged in support of their motion to quash [R. 9-11, 28; Tr. B-8-9].² The objection was overruled [R. 28]. The State rested [R. 28].

Appellants demurred to the evidence, asserting that the State had failed to prove that the books exceeded "contemporary community standards" [R. 28; Tr. B-9-10, 11-16, 21-32]. The State urged that it was not possible to produce an "average man" from the "community of Junction City" [Tr. B-17] or elsewhere, or to obtain a sufficient number of witnesses in order for the Court to determine "what a community standard in the community is" [Tr. B-17]. The State averred that "the Judge of this Court, Your Honor, if you please, is a resident of some substantial length of time in this community and is presently and was at all times pertinent to this case a resident of this community. We're speaking of the City of Junction City, or Geary County" [Tr. B-18]. The State urged that the issue of community standards "is a matter of law" [Tr. B-18]. The State contended that the court was required to "make a legal decision; in other words, to apply to these books the knowledge of the Court which it's entitled to do, of the standards of the community in which the Court lives and works, to determine in the Court's mind what

²The reference "Tr." is to the Reporter's Transcript of proceedings in the District Court (2 volumes), certified by the Clerk of the court below, and on file in this Court. The transcript of proceedings of August 7, 8 and 11, 1961, in one volume, is referred to as "Tr.A"; the transcript of proceedings of September 11, 14 and 15, 1961, in the second volume, is referred to as "Tr.B."

is an average person in the community, because the State could never establish this by any stretch of the imagination" [Tr. B-20-21].

Appellants' demurrer to the evidence was overruled [R. 28].

The appellants called witnesses on their own behalf.³ All were qualified to testify relative to the limits of candor in the community with respect to the description and representation of sex and nudity in books and other writings. Appellant offered into evidence a number of books, some twenty-nine in number, the property of the George Smith Public Library in Junction City, Kansas, and one book (*Tropic of Cancer*) which the librarian testified she wanted to purchase but which was too expensive, and another book, a copy of which belonged to the library but was lost.⁴

³Lois York [R. 29-32], Librarian of the George Smith Public Library in Junction City, Kansas; Edward A. Howard [R. 32-35], Librarian at the Lawrence Public Library, in Lawrence, Kansas; Dr. Richard Lichtman [R. 35-37], Assistant Professor of Philosophy at the University of Kansas City; Joseph Rubinstein [R. 37-40], Assistant Professor of Bibliography and Librarian at the University of Kansas.

⁴Lawrence, *Lady Chatterley's Lover* [Deft. Ex. 1, R. 29]; *Memoirs of Hecate County* [Deft. Ex. 2, R. 29]; Wallace, *The Chapman Report* [Deft. Ex. 4, R. 29]; O'Hara, *From The Terrace* [Deft. Ex. 5, R. 29]; Peyton Place [Deft. Ex. 6, R. 29]; O'Hara, *Ten North Frederick* [Deft. Ex. 7, R. 30]; Joyce, *Ulysses* [Deft. Ex. 8, R. 30]; Jones, *From Here to Eternity* [Deft. Ex. 9, R. 30]; Wolfe, *The Magic of Their Singing* [Deft. Ex. 10, R. 30]; O'Hara, *A Rage to Live* [Deft. Ex. 11, R. 30]; Mergendahl, *The Bramble Bush* [Deft. Ex. 11, R. 30]; Borth, *The Sot Weed Factor* [Deft. Ex. 13, R. 30]; Anderson, *Winesberg, Ohio* [Deft. Ex. 14, R. 30]; Caldwell, *God's Little Acre* [Deft. Ex. 15, R. 30]; Jackson, *The Fall of Valor* [Deft. Ex. 16, R. 30]; Caldwell, *Tobacco Road* [Deft. Ex. 17, R. 30]; Steinbeck, *Grapes of Wrath* [Deft. Ex. 8, R. 30]; Nabakov, *Lolita* [Deft. Ex. 19, R. 30]; Pennell, *History of Rome Hanks* [Deft. Ex. 20, R. 31]; Voltaire, *Can-*

The testimony of the witnesses established that all of the books introduced into evidence by appellants, books which generally could be found in the public library and on best-seller lists, were substantially more candid in description and representation of sex, and the explicit use of language, than could be found in the books involved in the case. The testimony of the witnesses was that the books offered into evidence by the State contained integrated plots and characters and did not exceed limits of candor or customary freedom of expression in the description or representation of sex [R. 33-34, 35-37, 38-40].

Following the presentation of the aforesaid testimony, appellants rested [Tr. B-136]. The State offered no rebuttal [Tr. B-136].

The District Court rendered a memorandum decision [R. 19-20; Appendix A] on September 19, 1961. The District Court construed the *Roth* test for obscenity as containing four essential ingredients: "average person"; "contemporary community standards," "dominant theme" and "prurient interests" [R. 19], the first two

dide [Def. Ex. 21, R. 31]; Huxley, *Brave New World* [Def. Ex. 22, R. 31]; Zola, *Nana* [Def. Ex. 23, R. 31]; Defoe, *Roxana, the Fortunate Mistress* [Def. Ex. 24, R. 31]; *The Satires of Juvenal* [Def. Ex. 25, R. 31]; *The Satyricon of Petronius* [Def. Ex. 26, R. 31]; Farrell, *The Young Manhood of Studs Lonigan* [Def. Ex. 28, R. 31]; Mykle, *The Song of the Red Ruby* [Def. Ex. 29, R. 31]; Miller, *Tropic of Cancer* [Def. Ex. 38, R. 31, Tr. B-117]; Mason, *The World of Suzie Wong* [Def. Ex. 27, R. 31]. Following the direct testimony of the witness York, counsel for appellants requested permission to withdraw the books which in all but two instances belonged to the public library, and to substitute duplicate copies as quickly as possible. There was no objection [Tr. B-53]. Together with the certified record and the Reporter's Transcripts of the proceedings, the Clerk of the court below has certified the State's Exhibits 1-31, and Defendants' Exhibits 1, 2, 4, 5, 6, 7, 9, 11, 19, 29, 38, now on file in this Court.

ingredients described by the Court to be "impossible as to ascertainment to a certainty" [R. 19].

The District Court stated that the Court would draw a line between the books in question and the books introduced by appellants—that line being "the purpose for which the books were written" [R. 20]. According to the District Court, the "core" of the books in question "would seem to be that of sex, with the plot, if any, being subservient thereto"; the "core" of the books introduced into evidence by appellants "would seem to be the plot, with sex being subservient thereto and only acting as an agent to carry the plot to its intended conclusion" [R. 20].

The District Court stated that the Court had made the *Roth* test operative in the case herein in the following manner: "If the books in question showed to this Court that their dominant purpose was calculated to effectively incite sexual desires and the Court further believed that they would have this effect on the average person residing in this community, then they are not entitled to the protection of the Amendment to the Constitution. This Court believes that the books under indictment here fall within the last statement and are not entitled to the said protection." [R. 20].

A motion for new trial was overruled [R. 20-21]. The order, judgment and decree of the District Court, directing the books to be turned over to the Sheriff of Geary County to be destroyed by said Sheriff, "upon the further order of this Court" [R. 20] was entered on January 19, 1962 [R. 16]. Execution of the said order of destruction has been stayed by order of the District Court pending final determination of the appeal herein.

On appeal to the Supreme Court of the State of Kansas, appellants renewed all their constitutional claims [R. 51-117], contending that the statute, on its face, and as construed and applied, abridged freedoms of speech and press, deprived appellants of their liberty and property without due process of law, denied the equal protection of the law, deprived appellants of their right to a jury trial, of their right to be secure from unreasonable search and seizure; that there was a failure of proof of the essential ingredients of the offense; that only the local standards of the community had been applied; that the books ordered destroyed were constitutionally protected, all in violation of the "First, Fourth and Fourteenth Amendments to the Constitution of the United States" [R. 57, 70, 83, 98, 108].

The Supreme Court of the State of Kansas affirmed the judgment of the District Court, Justices Price and Robb dissenting without opinion [R. 118-122; Appendix A]. The opinion of the Supreme Court sets forth the memorandum decision of Judge Fletcher, in full [R. 119-120]. The Supreme Court took note of the fact that appellants "are asserting all of the matters urged to the trial court" [R. 120].

The majority opinion recites the search and seizure procedures utilized in the case under the state statute, as heretofore detailed [R. 119]. After then setting forth the memorandum decision of the District Court, the opinion states that the test for obscenity provided in the statute (G. S. 1961 Supp. 21-1102a) is "adequate" and is being applied by the Court [R. 120].

The majority opinion states that the "vital question" is whether the seized books were in fact obscene [R. 121]; that the test for obscenity is not easy to state;

that Irvin S. Cobb once defined obscenity as when "the depth of the dirt exceeds the breadth of the wit" [R. 121].

As to the argument that no evidence was adduced by the prosecution to show comparison of the seized books with other books in common circulation, the opinion of the Court merely states that the District Court pointed out the difference between the seized books and the twenty-nine books taken from the Junction City Public Library [R. 121].

The majority opinion states that the brief submitted by the Attorney General listed the 31 seized books, "the pages upon which the obscenities occur", and a "short description" [R. 121]. The opinion states: "We have checked the cited pages and find that they well bear out the descriptions" [R. 121]. The Court then immediately added that the books as a whole come within the definition "found in paragraph 4 of the syllabus in Roth v. United States" [R. 121].

The Supreme Court stated that the seized books are "hard core pornography", "obscene by the definition found in the Roth case", or "by the definition found in the statute", or "by any other definition" [R. 121].

The Court stated that obscenity is not protected by the "First Amendment nor is it protected by the due process clause of the Fourteenth Amendment" [R. 121]; that there was "no right to a jury trial" [R. 122] because the action grows out of a statute, and no basis existed for a jury at common law. "Amendment VII of the federal constitution" preserves only the right of trial by jury "as it existed at common law" [R. 122], observed the Court.

The Court concluded that the seized books were without "literary merit", were "trash" [R. 122].

The opinion and judgment of the Supreme Court of the State of Kansas was entered on March 2, 1963 [R. 118]. A due and timely motion for rehearing [R. 123-124] again specified all the aforesaid constitutional claims under the "First, Fourth and Fourteenth Amendments to the Constitution of the United States" [R. 123]. The unconstitutional use by the Supreme Court of the "Hickin test" was also urged [R. 123]. The motion for rehearing was denied on April 15, 1963 [R. 126]. The Notice of Appeal to this Court, filed on July 9, 1963 in the Supreme Court [R. 127-135], again detailed the federal questions presented [R. 129-132], and they are renewed in this Jurisdictional Statement. See Question Presented herein.

The Federal Questions Presented Are Substantial.

1. The state statute makes no provision for a jury trial. All of appellants' requests for a trial by jury of the essential issues involved were denied by the District Court, and the ruling of the District Court has been upheld by the court below. Thus, 1,715 books have been ordered destroyed without a determination by a jury that the books go substantially beyond community standards or are otherwise "obscene" under the statute. It is submitted that a federal question of substance is presented.

In *Kingsley Books, Inc. v. Brown*, 354 U. S. 736, the issue was not pressed. Mr. Justice Frankfurter, writing for the majority, stated: "Appellants, as a matter of fact, did not request a jury trial, they did not attack the statute in the courts below for failure to

require a jury, and they did not bring that issue to this Court" (354 U. S. at 443-444.) Here, the constitutional attack on the statute, both on its face and as construed and applied, was duly made throughout the proceedings below, and the question has been appropriately preserved, it is submitted, for determination by this Court.

Mr. Justice Brennan, in *Kingsley Books, Inc. v. Brown*, dissented because "the absence in this New York obscenity statute of a right to jury trial is a fatal defect. . . . A statute which does not afford the defendant, of right, a jury determination of obscenity falls short, in my view, of giving proper effect to the standard fashioned as the necessary safeguard demanded by the freedoms of speech and press for material which is not obscene." 354 U. S. at 448. Mr. Justice Douglas' dissent in *Kingsley*, concurred in by Mr. Justice Black, found the statute to transgress constitutional guarantees because, among other things, the statute "substitutes punishment by contempt for punishment by jury trial". 354 U. S. at 447. In *Times Film Corporation v. City of Chicago*, 365 U. S. 43, Mr. Chief Justice Warren stated: "The inexistence of a jury to determine contemporary standards is a vital flaw." 365 U. S. at 68-69. Mr. Justice Stewart, not a member of this Court when *Kingsley* was decided, stated in *Volanski v. United States*, 246 F. 2d 842 (6th Cir. 1957), as Circuit Judge, that the question of obscenity "is peculiarly one best left for *nisi prius* determination, preferably by a jury" (246 F. 2d at 845). The federal question appears therefore to be one of substantial importance.

That the standards for judging the obscenity of writings must safeguard the protection of freedom of speech and press for material which is not obscene has been constantly affirmed by this Court. *Alberts v. California*, 354 U. S. 476; *Smith v. California*, 361 U. S. 147; *Marcus v. Search Warrants of Property*, 367 U. S. 717; *Manual Enterprises, Inc. v. Day*, 370 U. S. 478; *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58. But the Court has also emphasized that the operation and effect of the method by which speech is sought to be restrained must also be closely analyzed and initially examined. *Speiser v. Randall*, 357 U. S. 513, 520. "We risk erosion of First Amendment liberties unless we train our vigilance upon the method whereby obscenity is condemned no less than upon the standards whereby it is judged." Mr. Justice Brennan in *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 497. The question here is whether the safeguards provided by the free speech and press provisions of the First and Fourteenth Amendment for nonobscene material require a jury trial when it is sought to suppress material as "obscene"; whether the standards enunciated by this Court for judging the obscenity of writings, and the operation of such standards to assure protection for speech and press can effectively satisfy the requirements of the Constitution without a jury determination of "obscenity".

The Court has held that the Fourteenth Amendment does not permit the suppression of a writing unless to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. *Alberts v. California*, 354 U. S. 476, 489. It is this standard

which a majority of the Court in *Alberts* deemed "adequate to withstand the charge of constitutional infirmity." 354 U. S. at 489. It follows therefore, it is submitted, that no book can be suppressed as "obscene" if it does not substantially exceed the limits of candor set by contemporary community standards. If, at the very least, a writing, to the average person in the community, is within customary freedom of expression, a State is manifestly without power to prevent its dissemination. "The community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates." Mr. Justice Harlan in *Smith v. California*, 361 U. S. 147, 171. See also, *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 481-491.

If First Amendment freedoms are to be safeguarded in "obscenity" proceedings; if freedom of expression is to "be ringed about with adequate bulwarks" (*Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 66) then it is submitted only a jury representing a cross-section of the community should be empowered to decide what the community does or does not tolerate. A jury, in accordance with "our basic concepts of a democratic society and a representative government" is required to be a "body truly representative of the community", a "cross-section of the community," serving only "as instruments of public justice" and not as the "organ of a special class". *Glasser v. United States*, 315 U. S. 60, 85-86. "A jury trial for restrictions on the sale of books", stated Professor Chafee, "is probably required by both sound policy and the constitutional guaranty of the freedom of the press". *Free Speech in the United States* 539 (1941).

The genesis and evolution of the *Alberts* test for obscenity support the view that a jury trial is required in obscenity actions. In *United States v. Kennerly*, 209 Fed. 119 (S. D. N. Y. 1913), Judge Hand's now familiar dictum "should not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now?" was bottomed on the view that "a jury is especially the organ" to rely upon for such determination, 209 Fed. at 120-121. In *United States v. Levine*, 83 F. 2d 156 (2d Cir. 1936), Judge Hand again stressed the requirement of a jury in obscenity actions. "Thus 'obscenity' is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premise, but really a small bit of legislation ad hoc, like the standard of care". (83 F. 2d at 157.) Again, during discussion of the Tentative Draft by the American Law Institute, Judge Hand, expressing concern about the "absolute unknown contour" of the obscenity concept, stated that "we must leave it to the jury to say, is this obscene" American Law Institute, *Proceedings, 34th Annual Meeting*, 190-191 (1957).⁵

⁵Judge Hand's view that a jury in an obscenity action is really engaged in "a small bit of legislation ad hoc," underscores, it is submitted, the constitutional importance of the issue here presented. If the community, in deciding whether it will tolerate a book, is really engaged in lawmaking, who but representatives of the community—the jury—can validly enact the law? This question is posed *arguendo* for appellants do not accept the view that any book in the United States should be at the mercy of a vote of the "common conscience" of the community. See, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638.

Mr. Justice Harlan has noted that the "thoughtful studies" of the American Law Institute reflect a "two-fold concept" of obscenity. *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 485. A book is "obscene" only if, considered as a whole, its predominant appeal is to prurient interest, and if in addition it goes substantially beyond customary limits of candor. A. L. I. Model Penal Code, Proposed Official Draft (May 4, 1962), section 251.4(1). In arriving at this conclusion, the Institute emphasized that an essential issue under its test for obscenity is "the question of customary freedom of expression", and that "jury trial in this field has the merit of requiring unanimous condemnation by this sample of the general population" (A. L. I. Model Penal Code, Tent. Draft No. 6 (1957) 47.)

The background of the *Alberts* test for obscenity, therefore, as well as the opinion itself, supports the view that the "contemporary community standards" element made integral to the test is intended to protect writings tolerated by the community from arbitrary governmental suppression, and that freedoms of speech and press cannot be safeguarded if a cross-section of the community is not permitted to make the determination. There is historical support for this position. One of the objects of the First Amendment, for example, was to abolish the common law doctrine of "seditious libel", together with the then accepted legal view that the jury in such cases could not decide whether the writing was a seditious libel, but only whether the writing was "published". A learned English commentator stated that the doctrine was "wholly subversive of the rights of juries", that "trial by jury was the sole security for the freedom of the press." May, Constitutional His-

tory of England, vol. II (1888) 114. On questions of the extent of "customary freedom of expression", our tradition vests the determination of this question in a jury, not a single judge. Chafee, *Freedom of Speech*, 19 *et. seq.* (1920); Trial of Peter Zenger, 17 Howell's St. Tr. 675 (1735).⁶

The court below rejected appellants' claimed right to a jury trial, because, stated the court, the action here is civil, not criminal, arises out of statute, without basis in the common law; because the Constitution preserves only the right of trial by jury as it existed at common law [R. 121-122; Appendix A]. But we do not deal here with a suit in equity to restrain a riparian owner, or to tear down a party wall. The *in rem* proceeding was initiated here to destroy books, ordinarily protected from suppression by the provisions of the First Amendment. The framers of the Amendment did not intend to adopt "common law" concepts

⁶Of course, as with jury questions generally, a trial judge must initially determine that there is a jury question, "i.e., that reasonable men may differ whether the material is obscene." Mr. Justice Brennan, dissenting in *Kingsley Books Inc. v. Brown*, 354 U.S. 436, 448. But a court cannot instruct a jury that a given writing is obscene as a matter of law, "since elements other than the nature of the material itself enter into the determination, particularly the question of customary freedom of expression." A. L. I. Model Penal Code, Tent. Draft. No. 6 (May 6, 1957) 47. An appellate court may for similar reasons, reverse an obscenity judgment if a trial court fails to submit a controverted issue of community standards to a jury, but it may also reverse a jury determination if, in the opinion of the appellate court, reasonable men could not differ on the question of a writing being within the customary limits of candor. For a graphic example of these principles, see *Commonwealth v. Moniz*, 336 Mass. 178, 143 N.E. 2d 196 (1957); 338 Mass. 442, 155 N.E. 2d 762 (1959). And since the issue involves factual matters "entangled in a constitutional claim," the appellate courts, and ultimately this Court, may declare the material constitutionally protected despite the jury determination. *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 488.

with respect to freedom of expression; these common law principles were in many respects "rejected by our ancestors as unsuited to their civil or political conditions." *Grosjean v. American Press Co., Inc.*, 297 U. S. 233, 249. Since the State's power to suppress obscenity is limited by the constitutional protections for free expression, and since, it is submitted, the requirement of a jury trial is integral to the "community" standard for judging obscenity, it does not meet the issue to assimilate common law rules, or the non-existence of common law precedent, to prosecution of books as "obscene" in state *in rem* proceedings. See, *Smith v. California*, 361 U. S. 147, 152-153; *Marcus v. Search Warrants of Property*, 367 U. S. 717, 730-731. The issue is not, whether the Seventh Amendment requires a jury trial in obscenity prosecutions, but whether the First Amendment does so require. That question cannot be decided, it is submitted, by the common law of England.

It is inconsistent with First Amendment principles that a single person should in fact be able to suppress any book or periodical or work of art. See, Chafee, *Government and Mass Communications*, Vol. I (1947) 218. "A judge in his study surrounded by books may readily get scared about the dangers of the printed page, whereas jurors can be led to consult their own experience and see whether they ever knew anyone who was ruined merely by what he read." Chafee, *supra*, at 221. The *Alberts* test assumedly fashioned a barrier against arbitrary governmental suppression of a book by interposing the judgment of the "community". To substitute a judge for a jury to evaluate and determine whether a book goes beyond community stand-

ards, is essentially to substitute a government official for the representatives of the community and thus to erode the protective barrier.

2. Aside from the absence of a jury provision, the statute, on its face, and as construed and applied, violates the provisions of the First, Fourth and Fourteenth Amendments to the Constitution.

(a) On its face, the statute interdicts "obscene, immoral, lewd or lascivious" books, "manifestly tending to the corruption of morals" (G. S. 1961 Supp. 21-1102(a)). The test to be applied in cases under subsection (a) is, whether the effect of the book upon the average person in the community is to arouse "sexual desires or sexually improper thoughts" (G. S. 1961 Supp. 21-1102(b)).

Whenever a judge receives an information, verified "upon information and belief" by the county attorney or attorney general, stating that there is any prohibited book as set out in subsection (a) located within his county, it "should be the duty of such judge" to "forthwith" issue his search warrant directing the seizure of such "prohibited item or items". A copy of such warrant shall be served or posted by the Sheriff at the time of seizure of the material, and shall serve as notice to all interested persons of a hearing to be had "at a time not less than (10) days after such seizure". At the hearing, the judge issuing the warrant shall determine whether the items seized violate the statute. If the judge so finds, he shall order the items destroyed, provided such items shall not be destroyed so long as they may be needed in any criminal prosecution (G. S. 1961 Supp. 21-1102(c)).

The statute at the outset is so broad and so vague and ambiguous in its terminology that it suffers from the double vice of being "capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression" (*Smith v. California*, 361 U. S. 147, 151), and of failing to provide ascertainable standards so that men of common intelligence can determine what is or is not permissible (*Winters v. New York*, 333 U. S. 507). The statute broadly vests in public officials an unrestricted discretion to censor and suppress books. See, *Lovell v. Griffin*, 303 U. S. 444; *Thornhill v. Alabama*, 310 U. S. 88. The statute creates a system of prior restraints of expression, limitless in scope. Such a system "comes to this Court bearing a heavy presumption against its constitutional validity". *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 70.

A standard calling for the suppression of books deemed "immoral" or "manifestly tending to the corruption of morals of persons" fails to provide ascertainable standards and readily sweeps within its ambit constitutionally protected material. *Holmby Productions, Inc. v. Vaughn*, 350 U. S. 870, rev'g 177 Kan. 728, 282 P. 2d 412 (1955); *Musser v. Utah*, 333 U. S. 95, and the subsequent state decision, *State v. Musser*, 118 Utah 537, 233 P. 2d 193; *Kingsley International Pictures Corp. v. Regents*, 360 U. S. 684; *Commercial Pictures Corp. v. Regents*, 346 U. S. 587, rev'g 305 N. Y. 336, 113 N. E. 2d 502 (1953). Moreover, when the test to be applied in the use of such aforesaid standards is the effect of arousing "sexual desires" or "sexually improper thoughts", it is impossible to visualize any book that is safe from seizure

and destruction. Mr. Justice Harlan in *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 487, recognized that many "worthwhile works in literature, science, or art might be claimed to appeal to prurient interest" or stimulate "impure desires relating to sex". See, *Times Film Corp. v. City of Chicago*, 355 U. S. 35, rev'g 244 F. 2d 432, 435 (7th Cir. 1957). The statute here inveighs against any "sexual desire" and "sexually improper thought". What newspaper, book, magazine or other writing is safe under such vagrant and ambiguous standards, this wholly apart from the further question of the power of a State to suppress writings which arouse a sex desire or a naughty thought?

Nor was the construction of the statute by the courts below restrictive of the statutory language. The District Court declared that if the books in question showed "this Court" that their dominant purpose was "calculated to effectively incite sexual desires", and the court believed that the books would have this effect "on the average person residing in this community", then the books "are not entitled to the protection of the Amendment to the Constitution" [R. 120; Appendix A]. The majority opinion of the court below, after reciting the District Court's decision with manifest approval, avowed that "the test for obscenity is not easy to state"; then quoted Irvin S. Cobb's definition of obscenity, and then affirmed the suppression of the books "by the definition found in the Roth case, or by the definition found in the statute or by any other definition" [R. 121; Appendix A].

The statute on its face thus imposes prior restraint on the dissemination of writings in violation of the

First and Fourteenth Amendments. None of the safeguards found in the New York statute approved in *Kingsley Books, Inc. v. Brown*, 354 U. S. 436 appear in the statute. Here the proceedings are initiated solely by an information verified "upon information and belief." Cf. *Rice v. Ames*, 180 U. S. 371, 374. No copies of the publications alleged to be "immoral" and manifestly tending to the "corruption of morals" by arousing "sexual desires" and "sexually improper thoughts" are required to be submitted to the judicial officer before issuance of the warrant of seizure. In the light of the broad language of the statute, and the authorization to issue a warrant based on "information and belief", the statute authorizes a mass seizure and the removal of a broad range of writings from circulation.

There is no provision for any adversary proceeding on the issue of unlawfulness of the material prior to seizure. The statute effectively cuts off the circulation of the material and the public's access to the writings without any prior determination that the material is not entitled to constitutional protection. The judicial officer is under a duty to issue the warrant, and a hearing can be held "not less than" ten days after seizure. There is no limitation on the time within which a decision must be made. The statutory procedures here are permeated with even more constitutional infirmities than in *Marcus v. Search Warrants of Property*, 367 U. S. 717.

Moreover, the statute, by the breadth of its terms and the vagueness of its language, authorizes the issuance of general warrants against writings, and permits the arbitrary search for and seizure of all media

of communication. As such, the statute runs afoul of both the First and Fourth Amendments, subsumed into the due process clause of the Fourteenth Amendment. See, *Mapp v. Ohio*, 367 U. S. 643; *Near v. Minnesota*, 238 U. S. 697.

(b) The statute, as applied to the books herein involved, also violates the constitutional provisions aforesaid. It should be noted that only seven books were presented to the District Judge. The prosecutor, by notations, guided the Judge to the reading of excerpts in the books. Thus, the *Hicklin* method of judging the obscenity of writings was employed, despite the rejection of such method by this Court in *Alberts* "as unconstitutionally restrictive of the freedoms of speech and press". 354 U. S. 476, 489.

The District Judge refrained from stating that he had read the books in their entirety; he had only "scrutinized" them. The record shows that only about $\frac{3}{4}$ of an hour was consumed in such "scrutiny". Thus, as to the seven books, there was no attempt made, nor was there time, to determine the "dominant theme" of each of the books, "taken as a whole". See, *People v. Bantam Books* (*People v. Carr*), 9 Misc. 2d 1064, 172 N. Y. S. 2d 515 (1969).

The determination to issue the warrant was based upon the said scrutiny of the seven books, upon which basis the District Judge concluded that "any" publication bearing the imprint "This is an original Night Stand Book" would violate the statute. The warrant therefore authorized a broad, exploratory search, and wholesale seizure of books bearing the publisher's imprint aforesaid.

Pursuant to such warrant, the executing officer did in fact seize and remove 1,715 books, of which there was 31 different and specific titles. The warrant of seizure, issued on July 25, 1961 and executed on July 26, 1961, gave notice of a hearing to be held on August 7, 1961. The motion to quash was filed on the said day, and decision denying the motion was rendered on August 11, 1961. While it is true that appellants were compelled to seek a continuance of the hearing thereafter on the merits in order to properly prepare their defenses against such wholesale seizure, it appears clear, it is submitted, that there was in this case a "thoroughgoing and drastic restraint" on the circulation of books. *Marcus v. Search Warrants of Property*, 367 U. S. 717. See also, *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 518-519; *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58. Moreover, no jury determination was ever made that the books exceeded community standards, and the writings are still suppressed.

It is submitted that these federal questions are substantial. If a judicial officer, after reading, or scrutinizing, a specified number of books published by the "Richard Roe Publishing Co.", can thereafter decide that all books published by the "Richard Roe Publishing Co." "would" be "obscene", "immoral", "corruptive of morals", conducive to "sexual desires" and "sexually improper thoughts," and then issue a search warrant authorizing the seizure of all books published by the "Richard Roe Publishing Co.", it appears clear, it is submitted, that a way has been found for emasculating the provisions of the First and Fourth Amendments. The statute, on its face, and as applied, is merely

"an agency" for the suppression of constitutionally protected material. *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 72.

3. The statute, as construed and applied to the books herein, permits the suppression of books without proof that the writings exceed contemporary community standards.

(a) This omission of proof creates a serious constitutional infirmity in the law because evidence that a writing goes beyond customary limits of candor is an essential element of the test for obscenity; because the ingredient of "community standards" was made a part of the test "to tighten obscenity standards"; and because without such evidence, liberty and property, as in the case herein, can be lost without due process of law, and freedoms of speech and press abridged. *Manual Enterprises, Inc. v. Day*, 370 U. S. 478; 482-488; *Thompson v. City of Louisville*, 362 U. S. 199; *Schwartz v. Board of Bar Examiners*, 353 U. S. 232; *Garner v. Louisiana*, 368 U. S. 157.

Not only did the State fail to offer any proof that the books herein involved go substantially beyond the limits of candor in description or representation of sex, but the record makes abundantly clear that such proof was purposefully omitted as not constitutionally required. According to the State, in order to prove "community standards", it would be necessary to produce an indefinite number of witnesses in order to distill the viewpoint of the "average man" in Junction City [Tr. B-17]. This, the State averred, is an impossibility. But, affirmed the State, the *District Judge*, a resident of the community, could determine in his own mind "what is an average person in the community, because

the State could never establish this by any stretch of the imagination" [Tr. B-20-21]. All of this was proper, asserted the State, because the issue of community standards "is a matter of law [Tr. B-18].

As heretofore demonstrated, the issue of contemporary community standards involves factual matters entangled in a constitutional claim. A single Judge is not the "average man" in a community, nor does he represent "community standards", nor, it is submitted, can a State constitutionally create a single Judge as the embodiment of community standards. Such exercise of State power is both arbitrary and capricious. See Chafee, *Government and Mass Communications*, Vol. 1 (1947), 218-221. The argument of the State here that proof is impossible to adduce on the issue of community standards is without substance, first, because it is based on the erroneous view that community standards is solely a question of law, and second, because there are means available to prove community standards without gathering all the "average" men in the community as witnesses. See *Smith v. California*, 361 U. S. 147, 164-167, 171-172.

(b) While the State made no attempt to prove that the books herein go beyond contemporary community standards, the appellants, without rebuttal on the part of the State, proved that the books do not exceed the community limits of candor in description or representation of sex. This was done through expert testimony, and by the introduction into evidence of comparable books openly appearing in the public libraries, and sold and purchased in the community, and receiving wide general acceptance. If it is a denial of due process of law to make a finding of statutory violation

without evidentiary support, it would appear to compound the constitutional infirmity to make a finding of "obscenity" when the only uncontradicted evidence in the record shows that the statute is not violated. See, *Garner v. Louisiana*, 368 U. S. 157.

Moreover, the evidence of wide acceptance of comparable material offered by appellants was arbitrarily disregarded by the District Court, upheld by the court below, upon invalid grounds. The District Court held [R. 14; Appendix A] that the difference between the books in question and the comparable material offered into evidence by appellants was their "purpose", to wit, that "sex" was "subservient" to the plot in the comparable writings, while in the books in question, the plot was subservient to sex. Wholly apart from the merits of the District Court's literary criticism, it is submitted that the Court overlooked the essential relevance of the testimony. The issue before the Court was whether the comparable material, widely accepted in the community, did not in fact exceed, in candor of language and description and representation of sex, the books in question. Clearly, if the books in question did not go beyond the customary freedom of expression found in other writings tolerated in the community, then the books in question could not be held to exceed contemporary community standards. Whether sex was subservient to the plot of a book, or a plot subservient to sex, was not the issue.

The result of the action of the courts below is this: first, there is no finding in the record that the books herein exceed community standards (nor any evidence to support such a finding); and second, the appellants were essentially deprived of the right to present rele-

vant evidence in defense of the books. In both respects, the due process provisions of the Fourteenth Amendment were violated. *Thompson v. City of Louisville*, 362 U. S. 199; *Smith v. California*, 361 U. S. 147, 164-166, 171-172; *In re Harris*, 56 Cal. 2d 836, 366 P. 2d 305, 16 Cal. Rptr. 889 (1961); *Cf. State of Florida v. United States*, 282 U. S. 194, 215. The books herein face destruction solely because of a ruling that the books allegedly incite "sexual desires". See *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 486.

4. The books herein were ordered destroyed because of their alleged "effect on the average person residing in this community" [R. 120; Appendix A]. In short, the trier of the facts, upheld by the court below, condemned these books solely because the writings allegedly incited sexual desires in the average person of "Junction City, Kansas".

The adoption by the courts below of the geographical area of Junction City, Kansas as the community by which to determine the claims of constitutional protection for the writings, is violative of the free speech and press provisions of the First and Fourteenth Amendments, it is submitted.⁷

The First Amendment does not permit, it is submitted, the suppression of books merely because they may be deemed offensive by a local community. "The Constitution is not geared to patchwork geography. It tolerates no independent enclaves." *Christian v. Jemison*, 303 F. 2d 52, 55 (5th Cir., 1962).

⁷A similar constitutional issue is pending before this Court in a number of cases: *Smith v. California*, Oct. Term, 1963, No. 72; *Jacobellis v. Ohio*, Oct. Term, 1962, No. 164; *Williamson v. California*, Oct. Term, 1962, No. 948, cert. pending; *Wenzler v. California*, Oct. Term, 1962, No. 969, cert. pending.

The standards for judging obscenity formulated by this Court were clearly intended, it is submitted, to restrict the opportunities for suppression of writings in the United States. The Court has constantly held that the protections of the First Amendment are equally provided with the same force and effect in the Fourteenth Amendment. *Marsh v. Alabama*, 326 U. S. 501, 511; *Kingsley International Pictures Corp. v. Regents*, 360 U. S. 684. If these protections are to be safeguarded, it would appear essential that there be a national standard for the judging of obscenity. If the Nation as a whole tolerates a writing, thus affording the writing First Amendment protection, it cannot be the right of a local community, it is submitted, to burn the book as "obscene". Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 108-114 (1960). Since the inevitable tendency of the "local standards" test is to reduce the reading of books of general circulation to the level of reading of the most censorious local community, the public's access to ideas disseminated in all media of communication would be plainly diminished. See, *Butler v. Michigan*, 352 U. S. 380; *Smith v. California*, 361 U. S. 147.

The power of a local community to deal with "obscenity" is not curtailed in legal concept by a constitutional requirement that the trier of the facts measure the protection to which the book is entitled by the standards of the national community. The police power of a State or any local subdivision thereof is always limited, in any area, by the free speech and press, due process, and equal protection provisions of the Fourteenth Amendment. *Talley v. California*, 362 U. S. 60;

Chambers v. Florida, 309 U. S. 227; *Baker v. Carr*, 369 U. S. 186.

There is a two-fold requirement of proof with respect to "community standards" in obscenity prosecutions, if First Amendment guarantees are to be assured. First, the proof should show that the writing goes beyond the standards of the local community. Clearly, if the writing does not, that is the end of the matter. And of course, a local community may always permit a broader area of freedom of expression than even the First Amendment assumedly protects. See, *State v. Nelson*, 168 Neb. 394, 95 N. W. 2d 679 (1959). Secondly, the proof should show that the writing exceeds the contemporary standards of the country generally. Without such additional proof, the constitutional protection for writings which are not obscene is abridged.

We are not without precedent on this issue. In the naturalization field, where questions of free speech and press were not even involved, the courts accepted the view that "in order to determine whether a petitioner has met his burden of establishing that he is a person of good moral character . . . we should see if the petitioner's character coincides with the generally accepted mores or standards of the average citizen of the community in which the petitioner resides. . . . If the petitioner's conduct fails to satisfy the community test, then we should see whether the 'common conscience', when it is possible of being ascertained, of the community as a whole also looks unfavorably upon such conduct." *In re Mayalls Naturalization*, 154 F. Supp. 556, 560 (E.D. Pa. 1957), opinion by Chief Judge Ganey. See also, *In re Naturalization*

of *Spak*, 164 F. Supp. 257, 259-260 (E.D. Pa. 1958). Such a two-fold requirement safeguards personal and societal interests protected by the Bill of Rights. A lesser requirement creates "intolerable consequences" and encounters, it is submitted, "constitutional barriers." *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 487, 488.

5. The statute, as applied to the books here involved, violates the free speech and due process provisions of the First and Fourteenth Amendments.

(a) Since books may not be suppressed unless the evidence establishes clearly and unequivocally that to the average person, the dominant theme of each of the writings, taken as a whole, applying contemporary community standards, appeals to the prurient interest and is utterly without redeeming social importance, it is clear that the judgment of destruction here cannot stand, it is submitted. This because, as aforesaid, there is no proof, and there was no attempt to prove, that the books exceed contemporary standards. Moreover, appellants' expert witnesses, and comparable material obtained from the public libraries, established, without rebuttal, that the books in question do not go beyond the limits of candor in description and representation of sex and nudity. Since the Constitution requires proof of the "corruptive effect" of the writings, and, *in addition*, proof that the writings go substantially beyond customary freedom of expression in the various media of communication (*Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 483-491), the order for the destruction of the books as violative of the state statute is constitutionally impermissible.

(b) In the constitutional sense, the books cannot be held to go substantially beyond limits of candor in description and representation of sex and nudity. They clearly do not go beyond customary limits of expression in language or theme—indeed, they are far more muted—than many of the “best-sellers” in the literary world and in other media of communication, such as the motion pictures, television and the arts. Neither in language nor in theme do the books herein approach the candor of discussion, the explicitness of language, that is found in writings of noted authors generally accepted and widely read by the public.

The aforesaid is demonstrated, it is submitted, by comparing the books herein with such works as Lawrence, *Lady Chatterley's Lover* [Deft. Ex. 1, R. 29], where the descriptions of sexual activity are candid and the language used, explicit; Wilson, *Memoirs of Hecate County* [Deft. Ex. 2, R. 29], the stories of residents of a suburban community with detailed descriptions of sexual intercourse; Wallace, *The Chapman Report* [Deft. Ex. 4, R. 29], detailed description and representation of sexual activities; O'Hara, *From the Terrace* [Deft. Ex. 5, R. 29], explicit sexual scenes and language throughout the story; Metalious, *Peyton Place* [Deft. Ex. 6, R. 29], replete with realistic language and incidents involving rape, incest, sexual deviations, nymphomania and other sexual aberrations; O'Hara, *Ten North Frederick* [Deft. Ex. 7, R. 30], depicting in detail the sexual activities, marital and extra-marital, of a middle-aged Pennsylvania lawyer; Jones, *From Here to Eternity* [Deft. Ex. 9, R. 30], a realistic story of army life in Hawaii; Mergendahl, *The Bramble Bush* [Deft. Ex. 11, R. 30], a detailed

account of murder, adultery and seduction in a small New England town; Nabakov, *Lolita* [Deft. Ex. 19, R. 30], the tale of a continuous seduction of or by a twelve-year old girl by or with a middle-aged lover; Mykle, *Song of the Red Ruby* [Deft. Ex. 29, R. 31], graphic and explicit sexual descriptions throughout the writing.

These books, and many others, it should be recalled, were all in the public library of Junction City. There can be little dispute that the characteristics of the writings of the twentieth century are their realism, their naturalism. Descriptions of physical relations in such works "appear as regular staples of literary diet". *Grove Press, Inc. v. Christenberry*, 276 F. 2d 433, 438 (2d Cir. 1960). Candor in theme and language is now accepted by the general public, not only in books but in the visual arts as well. See, for example, *Cat on a Hot Tin Roof*, a motion picture depicting a wife trying to re-establish sexual relations with her husband, who is suspected of being a homosexual; *Tea and Sympathy*, a married woman helps a young student attain his manhood; *The World of Susie Wong*, a story of the world of prostitution; *The Revolt of Mamie Stover*, a prostitute struggles against Army restrictions; *The Apartment* (Oscar Winner), describing the extra-marital philanderings of the "organization man".

Measured by the standards of customary freedom of expression in the country today, the books herein are clearly not obscene, it is submitted.

(c) The court below described the books as "trash" and without "literary merit" [R. 122; Appendix A]. Neither of these appellations, it is submitted, are ap-

appropriate standards for denying constitutional protection to the writings. If the present, as well as the future, worlds of literature and the arts are to survive, it is unacceptable, it is submitted, to deny constitutional protection to books denoted as non-literary or valueless. It has become almost a truism that the "trash" of today is the "classic" of tomorrow. "What appeared daring and deserving of censorship in one decade becomes commonplace in the next". Cyc. of Soc. Sciences, Censorship, Vol. III, 294.

Thus, this Court has repeatedly warned that the content of writings which may be suppressed is extremely limited, not to be measured by subjective reactions to disagreeable themes or candid expression. To summarize: The guarantees of the First and Fourteenth Amendments apply equally to material designed to entertain or amuse as to scientific or educational writings. *Winters v. New York*, 337 U. S. 507. A writing is not to be deemed obscene because "it does not conform to some norm prescribed by an official", or because not in "good taste," or because it is not "good literature", or because it does not have "educational value", or because it is not "refined", or because it has no "enduring values", or because it is allegedly "trash". *Hannegan v. Esquire*, 327 U. S. 146. A communication is entitled to constitutional protection even if public officials deem it "sacrilegious". *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495; or "prejudicial to the best interests of the people". *Gelling v. Texas*, 343 U. S. 960; or "immoral", "harmful", "non-educational" and "non-amusing". *Superior Films, Inc. v. Dept. of Education (Commercial Pictures Corp. v. Regents)*, 346 U. S. 587; or "obscene, indecent and

immoral", *Holmby Productions, Inc. v. Vaughn*, 350 U. S. 870; or offensive to a "sense of propriety, morality and decency". *Mounce v. United States*, 355 U. S. 180; or because it "attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry". *Kingsley Int'l Pictures Corp. v. Regents*, 360 U. S. 684; or because it arouses "sexual desires". *Times Film Corp. v. City of Chicago*, 355 U. S. 35; or because it advocates and depicts nudism and nudity. *Sunshine Book Co. v. Summerfield*, 355 U. S. 372; or allegedly promotes "lesbianism" and "homosexuality" *One, Inc. v. Olesen*, 355 U. S. 371.

Moreover, Sex is not obscenity (*Alberts v. California*, 35 U. S. 476), and the label of "hard core pornography" cannot be attached to writings which society generally tolerates. *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 489-490.

The federal question relative to the constitutional protection afforded the books in question is substantial, it is submitted.

Conclusion.

It is submitted that the questions presented by this appeal are substantial and of public importance, requiring review by the Court.

Respectfully submitted,

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Of Counsel:

SAM ROSENWEIN,
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APPENDIX A.

Opinion and Judgment of the Supreme Court of the State of Kansas.

State of Kansas, Appellee, v. A Quantity of Copies of Books, Harold Thompson and Robert Thompson, d/b/a P-K NEWS SERVICE, Appellants.

No. 42,829

SYLLABUS BY THE COURT

In a proceeding in rem for the confiscation of thirty-one named paper-back books, it is determined that the said books were obscene and subject to seizure and destruction.

Obscenity has no constitutional protection as to free speech by either the federal or state constitutions.

There was no right to a jury trial in the above case, since there was no basis at common law for the within action.

Appeal from Geary district court; A. B. Fletcher, Jr., Judge. Opinion filed March 2, 1963: Affirmed, *Robert A. Schermerhorn*, of Junction City, and *Stanley Fleishman*, of Hollywood, California, argued the cause and *C. L. Hoover* and *William R. King*, of Junction City, were with them on the briefs for the appellants.

William M. Ferguson, attorney general, argued the cause and *Robert E. Hoffman*, assistant attorney general, and *William Clement*, county attorney, were with him on the briefs for the appellee. The opinion of the court was delivered by

JACKSON, J.: On July 24, 1961, William M. Ferguson, attorney general of Kansas, brought an action

under the new statute which had recently been passed by the Kansas legislature in relation to obscene books and writings. He thereupon caused to be filed before the district judge in Geary county at Junction City, the county seat, an information setting out that the P-K News Service of that city had in stock and possession a quantity of paper-back books which were named in the information. We are told that the judge was given seven copies of the books for perusal before issuing the warrant for seizure. The judge's remarks about his reading of the books may be found in the transcript of the proceedings of July 25, 1961. The court did not delay in issuing the warrant under section 4 of Laws of 1961, ch. 186. (Now also found in G.S. 1961 Supp. 21-1102c.)

Thereafter, the sheriff of Geary county was given a search warrant and notice of hearing. Harold Thompson and Robert Thompson, owners of the P-K News Service, were given notice to appear on August 7, 1961 to determine whether the books seized were obscene. After serving the warrant, the sheriff reported and certified that he had found 1715 individual copies of the paper-back books.

On August 7, 1961, the interveners—now appellants—filed a motion to quash. The court heard arguments on this motion on August 7, and on August 11, denied the motion to quash. On August 8, the appellants moved for a continuance. This motion was granted and the court continued the case until September 14. On September 6, appellants moved that they be granted a jury trial. This was denied. Thereafter, the matter was tried to the court, and the court handed down a short memorandum opinion on September 19,

1961. We are setting out the opinion here as the clearest way of showing what the trial court thought about the case:

"MEMORANDUM DECISION

(Filed September 19, 1961)

"The sole question before the Court at this time is whether the books in question, as shown in the warrant issued by this Court, are obscene literature as defined in Chapter 186 of the Session Laws of the State of Kansas, 1961.

"The test to be employed under our law is taken directly from an instruction approved by the Supreme Court of the United States in the case of Roth vs. the United States, which was decided together with Albert vs. State of California in 354 U. S. 476, 1 L. Ed. 2d 1498 (sic.), 77 S. Ct., 1304. This Court must then look to these two decisions.

"The test of obscenity as laid down by the Court in the Roth case is as follows: 'Whether to the average person, employing *contemporary community standards*, the *dominant theme* of the material taken as a whole appeals to prurient interests.'

"The four words or phrases italicized above form the yardstick by which these books are to be judged. The first two are impossible as to ascertainment to a certainty. The 'dominant theme' of the book is antonymous to 'isolated excerpts'. Webster's New World Dictionary of the American Language, College Edition (1960), defines 'prurient' as follows: '1. Having lustful ideas or desires. 2. Lustful, lascivious, lewd; as, prurient longings. 3. Itching.'

"The Court approved as a further guide the definition of obscenity in the Model Penal Code, Section 207. 10(2), as follows: 'A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond the customary limits of candor or representation of such matters.'

"This Court has further kept in mind, based upon the above decisions, that sex and obscenity are not synonymous.

"This Court would draw a line as between the books in question here and the books introduced by the intervener, that being the purpose for which the books were written. In the case of the books introduced into evidence by the intervener, the core of the said books would seem to be the plot, with sex being subservient thereto and only acting as an agent to carry the plot to its intended conclusion, while in the books in question, the core would seem to be that of sex, with the plot, if any being subservient thereto.

"This Court has made the rule of the Roth case, and the test as set forth in the law in question, operative in this case in the following manner: If the books in question showed this Court that their dominant purpose was calculated to effectively incite sexual desires, and the Court further believed that they would have this effect on the average person residing in this community, then they are not entitled to the protection of the Amendment to the Constitution. This Court believes that the books under indictment here fall within the last

statement and are not entitled to the said protection

"It Is Therefore Ordered, Adjudged, and Decreed that the books in question are found to be in violation of Chapter 186 of the Session Laws of the State of Kansas, 1961, and shall be turned over to the Sheriff of Geary County to be destroyed by said sheriff upon the further order of this Court."

Appellants have now appealed to this court and are asserting all of the matters urged to the trial court.

Turning to the statute (G. S. 1961 Supp. 21-1102a) we readily see that the first section contains a definition of obscenity. We believe that the test for obscenity which is provided is adequate and we are applying it in this case.

It would seem that the vital question is whether these seized books were in fact obscene. The test for obscenity is not easy to state. It is said that Irvin S. Cobb was once called as an expert witness in a case of claimed obscenity. He was asked to give a definition of obscenity. His answer was: "If the depth of the dirt exceeds the breadth of the wit, then in my opinion the book is obscene."

Appellants argue that there was no evidence showing comparison of the seized books with other books in common circulation. The trial court did point out the difference between the seized books and some twenty-nine others that were taken from the Junction City public library.

The attorney general's brief contains a section in which each of the thirty-one seized books is listed by

name and then the pages upon which obscenities occur are given along with a short description. We have checked the cited pages and find that they well bear out the descriptions. We would certainly agree that the books as a whole come within the definition found in paragraph 4 of the syllabus in *Roth v. United States*, 354 U. S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304, where it is said:

“(a) Sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest—i.e., material having a tendency to excite lustful thoughts.”
(P. 477.)

We are of the opinion that the seized books are in fact hard core pornography. We feel certain that young G.I.'s from Fort Riley—many of whom frequent Junction City—would be of the same opinion. We believe that the seized books are obscene by the definition found in the *Roth* case, or by the definition found in the statute or by any other definition.

We shall now answer briefly certain other matters. First of all, obscenity is not protected by the First Amendment of the Constitution of the United States nor is it protected by the due process clause of the Fourteenth Amendment nor, of course, under section 11 of our own Bill of Rights to the Constitution of Kansas, see *Roth v. United States*, supra.

The present case is not a criminal case but a civil case. The appellants are claiming that they had a right to a jury trial. If that were true, appellants would have to point out what form of action at common law formed the basis for the present suit. Both the

provision in section 5 of the Bill of Rights of the state constitution which reads: "The right of trial by jury shall be inviolate" and Amendment VII of the federal constitution preserve only the right of trial by jury as it existed at common law. This action grows out of a statute, and we know of no basis for it at common law. Therefore, there was no right to a jury trial.

We believe that the currently seized books are only attempts to carry pornography to the "nth" degree; that smut and obscenities seem to be the chief purpose of the books; that the story—what there is of it—is simply a framework upon which to hang the pornography. Certainly there is no literary merit in the thirty-one books seized. They are trash.

Having considered all matters raised in this case, the order will be made to affirm the trial court's ruling.

It is so ordered.

Price and Robb, JJ., dissent.

Filed March 2, 1963.

APPENDIX B.

Constitutional Provisions and Statutes Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

“Congress shall make no law . . . abridging the freedom of speech, or of the press; . . .”

2. The provisions of the Fourth Amendment to the United States Constitution are:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

3. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

“No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

4. The provisions of the general statutes of Kansas (G. S. 1961 Supp., §21-1102; L.1961, ch. 186, §1; June 30) are:

“(a) Any person who shall import, print, publish, sell, design, prepare, loan, give away or distribute any book, magazine, newspaper, writing, pamphlet, ballad, printed paper, print, picture,

drawing, photograph, publication or other thing, containing obscene, immoral, lewd or lascivious language, or obscene, immoral, lewd or lascivious prints, pictures, figures or descriptions, manifestly tending to the corruption of the morals of persons, or shall introduce into any family, school or place of education or shall buy, procure, receive or have in his possession, any such book, pamphlet, magazine, newspaper, writing, ballad, printed paper, print, picture, drawing photograph, publication or other thing, either for the purpose of sale, exhibition, loan or circulation, or with intent to introduce the same into any family, school or place of education, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than five (5) nor more than three hundred dollars (\$300), or be imprisoned not to exceed thirty (30) days, or both.

“(b) The test to be applied in cases under subsection (a) of this section shall not be whether sexual desires or sexually improper thoughts would be aroused in those comprising a particular segment of the community, the young, the immature or the highly prudish, or would leave another segment, the scientific or highly educated or the so-called worldly wise and sophisticated, indifferent and unmoved. But such test shall be the effect of the book, picture or other subject to complaint considered as a whole, not upon any particular class, but upon all those whom it is likely to reach, that is, its impact upon the average person in the community. The book, picture or other subject of complaint must be judged as a whole in

its entire context, not by considering detached or separate portions only, and by the standards of common conscience of the community of the contemporary period of the violation charged."

5. The provisions of the general statutes of Kansas (G. S. 1961 Supp. §21-1102(c); L. 1961, ch. 186, §4; June 30) are:

"Whenever any district, county, common pleas, or city court judge or justice of the peace shall receive an information or complaint, signed and verified upon information and belief by the county attorney or the attorney general, stating there is any prohibited lewd, lascivious or obscene book, magazine, newspaper, writing, pamphlet, ballad, printed paper, print, picture, motion pictures, drawing, photograph, publication or other thing, as set out in section 1 [21-1102] (a) of this act, located within his county, it shall be the duty of such judge to forthwith issue his search warrant directed to the sheriff or any other duly constituted peace officer to seize and bring before said judge or justice such a prohibited item or items. Any peace officer seizing such item or items as hereinbefore described shall leave a copy of such warrant with any manager, servant, employee or other person appearing or acting in the capacity of exercising any control over the premises where such item or items are found or, if no person is there found, such warrant may be posted by said peace officer in a conspicuous place upon the premises where found and said warrant shall serve as notice to all interested persons of a hearing to be had at a time not less than ten (10) days after such

seizure. At such hearing, the judge or justice issuing the warrant shall determine whether or not the item or items so seized and brought before him pursuant to said warrant were kept upon the premises where found in violation of any of the provisions of this act. If he shall so find, he shall order such item or items to be destroyed by the sheriff or any duly constituted peace officer by burning or otherwise, at such time as such judge shall order, and satisfactory return thereof made to him: *Provided, however,* Such item or items shall not be destroyed so long as they may be needed as evidence in any criminal prosecution."

OCT 7 1963

JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. 449

A QUANTITY OF COPIES OF BOOKS, HAROLD
THOMPSON AND ROBERT THOMPSON,
d/b/a P-K NEWS SERVICE,
Appellants,

vs.

STATE OF KANSAS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF KANSAS.

MOTION TO DISMISS

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d/b/a P-K NEWS SERVICE,
Appellants,**

vs.

**STATE OF KANSAS,
Appellee.**

**ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF KANSAS.**

MOTION TO DISMISS

Appellee, the State of Kansas, pursuant to Rule 16 of this Court, moves that the appeal herein be dismissed on the ground that the appeal presents no substantial Federal question.

QUESTIONS PRESENTED

There are but two questions of significance presented by this appeal. They are:

I. Are the seized books obscene, and therefore not entitled to the constitutional protection of free speech and press?

II. Did the procedure employed by the State in accordance with G.S. of Kansas, 1961 Supp., 21-1102(c), in seizing the books violate the Constitution of the United States?

STATUTE INVOLVED

The statute involved is entitled: *Obscene literature; unlawful acts; penalty; test as to obscenity.*

This statute is quoted in the appendix of the jurisdictional statement. Pertinent portions are as follows:

"(a) Any person who shall * * * sell * * * or distribute any book, * * * containing obscene, immoral, lewd or lascivious language, * * * manifestly tending to the corruption of the morals of persons * * * shall be guilty of a misdemeanor. * * *

"(b) The test to be applied in cases under subsection (a) of this section shall not be whether sexual desires or sexually improper thoughts would be aroused in those comprising a particular segment of the community, the young, the immature or the highly prudish, or would leave another segment, the scientific or highly educated or the so-called worldly wise and sophisticated, indifferent, and unmoved. But such test shall be the effect of the book, picture or other subject to complaint considered as a whole,

not upon any particular class, but upon all those whom it is likely to reach, that is, its impact upon the average person in the community. The book, picture or other subject of complaint must be judged as a whole in its entire context, not by considering detached or separate portions only, and by the standards of common conscience of the community of the contemporary period of the violation charged."

21-1102c. "Same: search warrant; seizure and destruction, when. Whenever any district, * * * court judge * * * shall receive an information * * * signed and verified upon information * * * by the * * * attorney general, stating there is any prohibited lewd, lascivious or obscene book, * * * as set out in section 1 [21-1102] (a) of this act, located within his county; it shall be the duty of such judge to forthwith issue his search warrant directed to the sheriff * * * to seize and bring before said judge * * * such a prohibited item or items. Any peace officer seizing such item or items * * * shall leave a copy of such warrant with any manager * * * and said warrant shall serve as notice to all interested persons of a hearing to be had at a time not less than ten (10) days after such seizure. At such hearing, the judge * * * issuing such a warrant shall determine whether or not the item or items so seized and brought before him pursuant to said warrant were kept upon the premises where found in violation of any of the provisions of this act."

STATEMENT

This is an appeal by interveners Harold and Robert Thompson, d/b/a the P-K News Service, Junction City,

1. It will be noted that the language of the statutory test for obscenity is taken directly from *Roth v. United States*, 354 U.S. 476.

Kansas, from a decision of the Kansas Supreme Court affirming the finding of the District Judge of Geary County, Kansas, that all copies of thirty-one different titles of books under a single publishing label found on interveners' premises (pursuant to an *in rem* proceeding under the Kansas statute) are obscene and an order for destruction of said books entered by the trial court on September 19, 1961.

The action was instituted on an Information filed with the Court by William M. Ferguson, as attorney general for Kansas, on July 24, 1961 (R. 4, 5). The Information was verified by him upon information and belief as required by the statute (R. 50). The verified Information, together with copies of seven different titles of books, each bearing the inscription on the face "This is an original Nightstand Book", was furnished to the District Judge at his home at about 5:00 p.m. on said date (R. 22). Thereafter, at the courthouse, in chambers, at 8:30 p.m., the District Judge held a short *ex parte* proceeding (R. 5), at which time he ordered a Warrant issued forthwith (R. 6).

The Warrant commanded the searching for and seizure of specific books listed by title in the caption of the Warrant (R. 6, 8, 48 and 49). The sheriff, in executing the Warrant, seized only books so listed (R. 8, 48 and 49).

The Search Warrant contained a Notice of Hearing which was set for August 7, 1961, at 10:00 a.m., in the courtroom in the courthouse at Junction City, Kansas (R. 7). The sheriff of Geary County executed the Warrant, seizing numerous copies of many of the titles of books listed in the caption of the Warrant, on the 26th day of July, 1961, and at the same time left a copy of the the Warrant and Notice of Hearing with one Zeldia Tib-

bits, bookkeeper at the P-K News Service at the premises described on the Warrant.

On August 7, 1961, the day named in the Notice as the day for hearing on the question of obscenity of the books, Harold Thompson and Robert Thompson, as owners and distributors of said books, filed a Motion to Quash the Information and Warrant on various constitutional grounds, but particularly on the grounds that the statute under which the action was commenced and the procedure followed by the state in support of the seizure of said books constituted a violation of free speech and press as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States and Sections 11 and 18 of the Kansas Bill of Rights (R. 9), which Motion was argued on the same date (R. 17).

At this hearing it was the appellants who attempted to restrict the community to the area of Junction City, Kansas, or Geary County (Tr. A-8, 9, 10, 11, 12 and 13), by placing an Assistant Attorney General on the witness stand. The state specifically rejected this concept of "community" (Tr. A-29, 30).

The trial court's attention was directed to the statutory standards for determining whether the seized books were obscene, and his attention had also been directed to the decision of this Court in *Marcus v. Search Warrants*, 367 U.S. 717 (1961), prior to the issuance of the Warrants (Tr. A-31, 32).

On the following day, August 8, 1961, defendants filed a Motion for Continuance which was sustained by the Court and the matter set for hearing on the merits on September 14, 1961 (R. 17). On August 11, 1961, the Court overruled interveners' Motion to Quash (R. 17). On September 6, 1961, intervener-appellants filed a Mo-

tion for a Jury Trial (R. 12) which, after argument, was by the court overruled on September 11, 1961 (R. 18). Finally, on September 14 and 15, 1961, the matter was tried on the issue of whether or not the books seized were obscene (R. 16). The books seized were introduced in evidence pursuant to a stipulation that they were, at the time of seizure, being kept for sale by appellant interveners (R. 28). Appellant interveners, after unsuccessfully demurring to the evidence on the ground that the state had not introduced any evidence to establish "contemporary community standards" (R. 28), proceeded to introduce evidence for that purpose in the form of a number of works of literature containing passages describing sex activity (R. 29, 30 and 31). These works were the property of the Public Library in Junction City, Kansas. The town librarian York, however, on cross-examination, testified that, out of a population of 20,000 in the city, the library had only 4,200 outstanding library cards, of which half were adult cards and half were inactive (R. 32). She further testified that requests for the works introduced by appellants came from persons in the community who were part of the community's "educated class" (R. 32).

The balance of appellants' evidence was testimony by purported expert witnesses of a comparison between the seized books and said literary works. Appellants made no pretense that any of their witnesses were by any standard average members of any community. For example, witness Howard, a librarian in Lawrence, Kansas, holds a Master's Degree in Library Science (R. 32) and is a family man of religious inclination with a religious family background (R. 33). Witness Lichtman is a Professor of Literature at a large university who taught at Yale University before coming to the Middlewest. He

received his Bachelor's degree from the University of Pennsylvania and holds a Master's and Ph.D. from Yale (R. 35, 36). Witness Rubenstein is a professor at the University of Kansas and holds the degrees of Master of Arts and Master of Library Science (R. 37). Three of the four witnesses used by appellants were librarians and each of the three indicated none of the seized books were in his library. After this testimony, the defense rested.

On September 19, 1961, the trial court, in a memorandum decision, found all of said books to be obscene material and ordered their destruction (R. 19). On the same day intervenor appellants moved the court for a new trial, which Motion was heard and overruled on September 26, 1961 (R. 20). Timely Notice of Appeal was served and filed by intervenor appellants on September 29, 1961 (R. 15).

After briefing and argument, the Kansas Supreme Court affirmed the findings and rulings of the District Court in an opinion filed March 2, 1963 (R. 118). It is from this decision that the instant appeal was taken.

On August 5, 1963, a transcript of the testimony before the trial court was filed with the Clerk of the Kansas Supreme Court and forwarded with the record to the Clerk of this Court. This transcript was not before the Kansas Supreme Court when the opinion appealed from was filed. The record before that court consisted solely of the appellants' abstract of the trial record.

ARGUMENT

No Substantial Federal Question Is Presented by This Appeal.

The Books which are the subject of this appeal are obscene and as such are not entitled to the constitutional protection of free speech and press.

None of these books has any semblance of literary merit. They are a part of the smut peddling business which Cleveland Amory has characterized as "Paperback Pornography." He begins his article in the April 6, 1963, *Saturday Evening Post* by saying:

"It is no secret these days that in the field of paperback books the big best sellers are the Erskine Caldwells, Henry Millers, Harold Robbinses, Irving Wallaces, Grace Metaliouses, et al. Compared to the real hardcore paperback pornography which has followed in their wake, however, these are boy scout manuals."

The only designation of publication contained in each book is:

"This is an Original Night Stand Book". Amory lists Night Stand publications as being within this category.

Life magazine's lead editorial "Is Any Book Legally Obscene Any More" in its September 27, 1963, issue (see appendix) quotes with favor Mr. Justice Frankfurter's position deploring "dirt for dirt's sake, or more exactly for money's sake."

These books are solely concerned with sex. Although sex alone does not constitute obscenity, it is the contention of the State that each of them may be classified as

pornography, or at least bordering on pornography; that they are trash with no social value. Thus considered, it is the contention of the State that each of them is obscene within the test prescribed by G.S., 1961 Supp., 21-1102(b), and subject to seizure and destruction pursuant to 21-1102(c) and, that each of them is obscene and not within the area of constitutionally protected speech and press.

As a guide to the proper constitutional tests to be employed by the Supreme Court of the State of Kansas the State's brief contained the following:

CONSTITUTIONAL TESTS FOR OBSCENITY.

It may be said there are four constitutional tests of obscenity. The Supreme Court in the *Roth-Alberts* Opinion [*Roth v. United States*, 345-U.S. 476] laid down three constitutional tests for determining obscenity. They are:

- (1) The material must be judged as a whole.
- (2) The material must be judged by its effect on the average person, applying contemporary community standards, which "community" under state law would be the state² and
- (3) The dominant theme of the material must appeal to prurient interests.

To which tests prescribed by *Roth*, the Supreme Court later in *Manual v. Day*, *supra* (1962), added a fourth:

- (4) "'Patent offensiveness' that is to say the material must be so offensive on its face that

2. The U. S. Supreme Court in *Manual v. Day* [370 U.S. 478], concludes the relevant "community" under a federal statute is the nation. It seems reasonable to assume that the "community" under a state statute would be the state.

it affronts current community standards of decency."

The trial court in the case at bar applied the standard of the *Roth-Alberts* decision and also correctly anticipated the *Manual v. Day* addition to *Roth-Alberts*. In its memorandum decision the trial court said:

"The test of obscenity as laid down by the court in the *Roth* case is as follows: 'Whether to the average person, employing contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests.'

"The Court approved as a further guide . . . : 'A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i. e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond the customary limits of candor or representation of such matters.'"

Thus, in ordering the destruction of these books, the trial court used the constitutional yardstick prescribed by the Supreme Court of the United States.

Following the suggestion contained in *Manual v. Day*, that "'hard core' pornography, or something less, . . ." is the test of obscenity, the following analysis was submitted to the Kansas Supreme Court.

WHAT IS PORNOGRAPHY?

Drs. Eberhard and Phyllis Kronhausen in their book *Pornography and the Law* define an obscene or pornographic book as:¹¹

11. *Pornography and the Law*, Ballantine Books, New York, page 178 (1959).

"A book which is designed to act upon the reader as an erotic psychological stimulant ('aphrodisiac') must constantly keep before the reader's mind a succession of erotic scenes. It must not tire him with superfluous non-erotic descriptions of scenery, character portrayals, or lengthy philosophical expositions. All these are unnecessary trimmings for the writer of 'obscene' books. The idea is to focus the reader's attention on erotic word-images, and not to distract him with side issues and tangents of one kind or another."

The Drs. Kronhausen further analyze pornography as having certain rather well defined attributes (pages 178 to 244), as follows:

(1) Women who figure prominently in pornographic books are generally as anxious to be seduced as men are to seduce them. There is very little foreplay.

(2) The females are generally of the nymphomaniac type and are almost invariably beautiful of face with an overdeveloped figure.

Drs. Kronhausen say at page 227:

"In keeping with the wish-fulfilling nature of 'obscene' writings, the female characters in these stories are just as men would like women to be: highly passionate, sensuous, and sexually insatiable creatures who like nothing better than almost continuous intercourse.

"Conspicuous by its absence in 'obscene' writings is any trace of genuine modesty, restraint, or anxiety on the part of the women, which are certainly outstanding characteristics of most females in our culture. For instance, it strikes one immediately that none of the women in any of our ten specimen books [discussed in this chapter] seem to have the least concern about pregnancy in spite of all their promiscuous behavior."

(3) Defloration is coupled with rape and sadism. The female is generally desirous of the act and obtains exotic enjoyment despite the pain. There is seldom any indication of hostility on the part of the female who has been raped.

(4) The males are generally supersexed.

(5) There is an emphasis on Lesbianism. Pornographic books are generally written by males for male consumption. Descriptions of homosexuality between women is assumed to have an erotic effect upon male readers.

(6) Violence and flagellation is common. Cruelties perpetrated upon females are an integral part of pornography.

(7) Sexual orgies involving several persons of both sex are common. So is incest.

Generally speaking, pornography has an unrealistic and dream-like quality. Sexual relations are animal like—without build-up. They are direct and crude. Sex in pornographic books is not related to love nor does it treat sexual relations with realism, in fact, love is almost never mentioned."

These are the characteristics of pornography and these are the characteristics of each book in this case.

Each of these seized books on its face is pornographic. Were the sexual descriptions expurgated, there would be nothing. Appellants have sought to demonstrate that the seized books do not on their face affront current community standards of decency because such books as *Lady Chatterley's Lover*, *Peyton Place*, *The Chapman Report* and *Lolita* contain sexual descriptions which go beyond the candor found in some of the seized books. This may be true, but each of the books introduced into evidence by the Appellants contain literary merits beyond the sexual

descriptions. Moreover, each such book treats sex with realism and not with the pornographic approach utilized in all of the seized books. The seized books are trash—worse than trash. They meet every test of “hard core” pornography. They are without any redeeming social importance.

Each of the seized books contains almost precisely the same number of words. Of the books seized, sixteen have 190 pages, eleven have 191 pages, two have 192 pages and one has 189 pages.

On the front fly leaf of each the publisher endeavors to make the pornographic pitch—“Sex-Hungry Girl”, “I’m a Lesbian!”, “The Price of Sex”, “Whose Lips on Her Body”, “Hot Pants Marian”, “Give Me Your Body”, “Lust-sated Couples”, “Whore or Mistress” and so on *ad nauseam*.

On the back of the cover there is a pandering eye-catcher such as “Passion Gone Berserk”, “Come Sleep With Me”, “Unnatural Sex”, “A Loose Woman”, “Lusty Holiday”, “Problems in Bed”, “Once a Virgin”, “My Mistress and My Son”, “Hungry for Love” and so on and on.

There are but seven different authors for all the books seized.

Examination of these books will reveal they are designed to fit a particular format. They are all the same length and all the same type. In the back fly leaf there is a list of “Other Nightstand Books” with a long list of meaningless, suggestive titles.

By every suggestion and innuendo, these books are directed to appeal to the sexual interest—the prurient interest—of the buyer and the reader.

In order to demonstrate the consistency with which the sexual episodes appear in the seized books, the State

prepared a summary of each book for the Supreme Court of Kansas. This summary is reproduced in the appendix hereto.

The Procedure Followed Pursuant to the Kansas Statute Presents No Federal Question by Reason of Any Violation of the First, Fourth and Fourteenth Amendments to the Constitution of the United States.

Appellants' attack upon the procedure followed by the state in the instant cause is grounded upon (1) the absence of a provision for jury trial, (2) that the seizure provision of the statute constitutes an unconstitutional prior restraint upon publication of the books, and (3) the issuance of the warrant *ex parte*, on an information not positively verified, "violates the First, Fourth and Fourteenth Amendments to the United States Constitution.

In support of their contention that the failure to provide for a jury trial is a constitutional infirmity in the statute, appellants quote from opinions of justices of this Court, which opinions are dissents or opinions by intermediate courts. An interesting feature of appellants' attitude on this point is expressed in the note at the bottom of page 23 of appellants' jurisdictional statement in which it is said by appellants:

"This question is posed *arguendo* for appellants do not accept the view that any book in the United States should be at the mercy of a vote of the 'common conscience' of the community."

It is impossible to determine what the position of appellants would have been had a jury been chosen from among the citizens of Geary County, Kansas, and that jury found the subject books obscene. Had the instant action been a criminal proceeding as authorized by another section of

the statute, appellants, of course, would have been entitled to a jury trial on all questions. Appellants, however; in the present proceeding, must ask this Court to find in the First Amendment to the Constitution of the United States some provision requiring a jury, even though the action is in a form which has never provided for a jury in any other application. No rational analysis of the First Amendment can possibly reveal any such requirement.

Appellants urge that the obscenity test, fashioned by *Roth v. United States*, *supra*, and *Manual v. Day*, *supra*, was designed or framed specifically for use by a jury, and therefore only a jury is competent to apply such standards. The Court is reminded this appeal is from a civil action *in rem* against the books themselves. It is well said in 50 C.J.S. 770, *Juries*, Sec. 67:

"Since . . . the constitutional guaranty of a right to trial by jury does not ordinarily extend to civil actions for the recovery of penalties or enforcement of forfeitures, it is within the power of the legislature to provide that such proceedings shall be summary in nature without any right to trial by jury, where the particular proceeding was not triable by jury at common law . . . Statutes have also been held constitutional which provide for a summary seizure and destruction of gambling implements and devices, property declared to be a nuisance, intoxicating liquors kept for sale contrary to the law, or property used in the illegal sale or manufacture of intoxicating liquor, . . ."

An action *in rem* was not known to the common law (1 C.J.S., *Actions*, Sec. 52a). In *Furth v. State*, 72 Ark. 161, 78 S.W. 759, at page 760, it was said by the Supreme Court of Arkansas:

"The objection that the act in question does not provide for a jury is a serious one. But this is a pro-

ceeding in rem of a civil nature. It is a summary proceeding in the exercise of the police power of the state, under a statute passed to suppress the nuisance of gambling. Gambling was a nuisance at common law, and in such case trial by jury was not a right at common law. It is only in cases where a jury could be demanded as a matter of right at common law that the refusal of a jury under our Constitution is ground for reversal."

To the same effect see *Frost v. People*, 193 Ill. 635, 61 N.E. 1054; *Kite v. People*, 32 Col. 5, 74 Pac. 886; *State v. Klondike*, 76 Vt. 426, 57 Atl. 994; *Cambria v. Bachmann*, 93 W. Va. 463, 118 S.E. 336; *People v. One Pinball Machine*, 316 Ill. App. 306, 44 N.E.2d 949; *State Conservation District v. Brown*, 335 Mich. 343, 55 N.W.2d 859; *Van Oster v. Kansas*, 272 U.S. 465; *State v. Lee*, 113 Kan. 462, 215 Pac. 299.

Sec. 21-1102c provides in pertinent part:

"At such hearing, the judge or justice issuing the warrant shall determine whether or not the item or items so seized and brought before him pursuant to said warrant were kept upon the premises where found in violation of any of the provisions of this act. If he shall so find, he shall order such item or items to be destroyed by the sheriff or any duly constituted peace officer by burning or otherwise. . . ."

This proceeding is brought under an act of the legislature passed in the exercise of the police power of the state to suppress the nuisance of keeping obscene material for sale or distribution. This Court has never indicated that the only trier of facts capable of applying the standards of obscenity laid down by it is a jury. We are at a loss to see why any judicial officer is less capable than a jury to determine what is essentially a mixed question of law and fact.

Appellants' contention that the statute and state's procedure under it are unconstitutional for the reason that the statute purports to authorize and the procedure to carry out a "prior restraint" in violation of the First Amendment of the Constitution of the United States on authority of *Near v. Minnesota*, 238 U.S. 697, is untenable. In the first place there was here no "prior restraint", the books furnished to the judge prior to issuance of the search warrant having been acquired by the attorney general in the market place. But this Court, although admittedly it has in numerous recent decisions found the First Amendment to be binding on the states via the Fourteenth, has specifically rejected the proposition that "prior restraint" of material under the protection of the First Amendment's guarantee of freedom of speech and press is *per se* a violation of the First Amendment (*Times Film Corp. v. City of Chicago*, 365 U.S. 43).

That case involved a motion picture, which medium of expression, as this Court is fully aware, has been granted the same protection under the First Amendment as books, newspapers, etc. (*Burstyn v. Wilson*, 343 U.S. 495, 96 L. Ed. 1098, 72 S. Ct. 777).

In the *Times Film Corporation* case, however, the Court had before it only the issue of "prior restraint" being a violation of the First and Fourteenth Amendments. The city required the submission of a film to a board of review before exhibition, which petitioner corporation sought to enjoin. At page 44 it was said:

"Its sole ground is that the provisions of the ordinance requiring submission of the film constitutes, on its face, a prior restraint within the prohibition of the First and Fourteenth Amendments."

At page 47-48, the Court said:

"It has never been held that liberty of speech is absolute. Nor has it been suggested that all previous restraints on speech are invalid. On the contrary, in *Near v. Minnesota* [citation], Chief Justice Hughes, in discussing the classic legal statements concerning the immunity of the press from censorship, observed that the principle forbidding previous restraint 'is stated too broadly, if every such restraint is deemed to be prohibited. . . .' Some years later, a unanimous Court, speaking through Mr. Justice Murphy, in *Chaplinsky v. New Hampshire*, [citation] held that there were 'certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting words—those by which by their very utterance inflict injury or tend to incite an immediate breach of the peace.'"

And again, at page 50:

"Certainly petitioner's broadside attack does not warrant . . . our saying that—aside from any consideration of the other 'exceptional cases' mentioned in our decisions—the State is stripped of all constitutional power to prevent, in the most effective fashion, the utterance of this class of speech."

To the same effect see *Smith v. California*, 361 U.S. 155.

Appellants, in their jurisdictional statement, indicate that the procedure leading to the issuance of the warrant in this case is a close parallel of the procedural facts considered by this Court in *Marcus v. Search Warrant*, 367 U.S. 717. Nothing could be further from the situation. The 1961 session of the Kansas legislature passed the act providing the procedure for the instant action and ad-

journe*d sine die* in April, 1961. *Marcus* came down in June, 1961. The procedure in the instant action was prepared with careful attention to that case, as well as to the procedure in the Kansas statute. The statement of facts hereinbefore set out shows the trial judge to have been furnished a copy of the opinion in *Marcus* before the warrant was issued. This was no blanket or general warrant procedure.

Appellants' attack on the procedure leading to the issuance of a warrant is two-fold: (1) That the "Information" authorized by Sec. 21-1102c, being verified upon information and belief, will not justify the issuance of a search warrant in that it does not give the magistrate reasonable grounds upon which to issue such warrant; and (2) that the statute (21-1102c) is defective in that it makes no provision for notice and hearing prior to the issuance of such warrant.

Issuance of a warrant by a magistrate to search for contraband or forfeitable material and to seize same, to be brought before said magistrate, is well established in Kansas (G.S. 1949, 21-944; 21-925) and the magistrate's authority, after notice and hearing, to cause such material to be destroyed (G.S. 1949, 21-925, 926, 927 and 947) is also established. Since 1895, the foregoing procedure (seizure and destruction of gambling paraphernalia) has been a part of the Kansas statutes. Such proceedings are *in rem* and closely parallel the procedure authorized by 21-1102c in the instant cause. Similar *in rem* proceedings are authorized for impure or unsafe food or drugs under the Kansas Food, Drug and Cosmetic Act (G.S., 1961 Supp., 65-600). Such procedure is of course well known in the enforcement of liquor laws. Such proceedings are generally recognized and utilized in other

jurisdictions (79 C.J.S. 927, *Searches and Seizures*, Secs. 115-117).

The statute here in question (21-1102c) specifically provides for the issuance of a warrant by certain named judges when such judge "shall receive an information or complaint, signed and verified upon information and belief by the county attorney or the attorney general. . . ." That such an affidavit, i. e., upon information and belief, will suffice to give a magistrate the right to believe there is probable cause for issuance of the search warrant has been upheld in many states (*Hudgens v. State*, 74 Okl. Cr. 56, 112 P.2d 815; *Smith v. State*, 191 Md. 329, 62 A.2d 287, 5 A.L.R.2d 386; *Rose v. State*, 171 Ind. 662, 87 N.E. 103; *State v. Kees*, 92 W. Va. 277, 114 S.E. 617, 27 A.L.R. 681; *State v. Peterson*, 27 Wy. 185, 194 Pac. 842, 13 A.L.R. 1284; *Rozner v. State*, 109 Tex. Crim. 127, 3 S.W.2d 441; *Smith v. State*, 114 Tex. Crim. 315, 23 S.W.2d 387, 24 S.W.2d 1095; *Parrack v. State*, 154 Tex. Crim. 532, 228 S.W.2d 859; *Bergman v. State*, 189 Wis. 615, 208 N.W. 470; *Frihart v. State*, 189 Wis. 622, 208 N.W. 469; *Marshall v. Commonwealth*, 140 Va. 541, 125 S.E. 329; *Nash v. State*, 171 Miss. 279, 147 So. 25; *Commonwealth v. Schwartz*, 82 Pa. Sup. 369).

But in the instant cause, in addition to the verified Information, there were placed before the Court, prior to issuance of the warrant, seven volumes of the thirty-one volumes named in the Information, each of which volumes bore the same publisher's identification, to wit: "This is an original Nightstand Book", as did each of the volumes named in the Information (R. 5). The Court, *ex parte* in chambers, scrutinized said seven books, as shown by the Journal Entry (R. 16) Whereupon, the Court found reasonable grounds upon which to issue the warrant requested in the state's Information (R. 5).

Although 21-1102c does not specifically provide for evidence *aliunde* the verified information as a prerequisite to issuance of the warrant there authorized, this procedure was followed by the state on the authority of *Marcus*. In that case, search warrants were issued by the Circuit Court of Jackson County, Missouri, purporting to authorize the search for and seizure of obscene magazines to be found on the premises of the Kansas City News Distributors. The statute in question under which the warrants were issued was similar to 21-1102c. It provided for notice and hearing and for destruction procedure if, at the hearing, the magistrate found the matter so seized to be obscene. The warrant in that case, however, was general in nature, simply ordering the officers executing said warrant to search "within 10 days after issuance of this warrant by day or night and seize obscene materials and take same into your possession". Under this warrant, the officers sorted through all the materials on the named premises and took such publications as, in the opinion of the officers, were obscene.

This Court first reviewed at length the history of search and seizure and methods exercised throughout the history of the common law to suppress obscene publications. However, the Court's opinion was based on procedural factors discussed, commencing at page 731, as follows:

"We believe that Missouri's procedures as applied in this case lacked the safeguards which *due process* demands to assure non-obscene material the constitutional protection to which it is entitled. Putting to one side the fact that no opportunity was afforded the appellants to elicit and contest the reasons for the officer's belief, or otherwise to argue against the propriety of the seizure to the issuing judge, still the war-

rants issued on the strength of the conclusory assertions of a single police officer, *without any scrutiny by the judge of any materials considered by the complainant to be obscene*. The warrants gave the broadest discretion to the executing officers; they merely repeated the language of the statute and the complaints, *specified no publications*, and left to the individual judgment of each of the many police officers involved the selection of such magazines as in his view constituted 'obscene . . . publications.' . . . It is no reflection on the good faith or judgment of the officers to conclude that the task they were assigned was simply an impossible one to perform with any realistic expectation that the obscene might be accurately separated from the constitutionally protected. They were provided with no guide to the exercise of informed discretion, because there was no step in the procedure *before seizure* designed to focus searchingly on the question of obscenity." (Our emphasis.)

In the light of this language appellee carefully framed the procedure in the instant cause with a view to meeting the objections to the Missouri procedure in *Marcus*.

This Court carefully declined to find that the Missouri statute, as such, was constitutionally infirm. It was said, in this connection, at page 738:

"Nor is it necessary for us to decide in this case whether Missouri lacks all power under its statutory scheme to seize and condemn obscene material. Since a violation of the Fourteenth Amendment infected *the proceedings*, in order to vindicate appellants' constitutional rights the judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion."

Thus, in the instant case, the Information filed with the trial court was accompanied by a substantial sampling of books to be scrutinized by the magistrate to whom the petition for search warrant was directed. Further, the Information named specific book titles, as did the search warrant, which gave the officers no choice in executing the warrant as to the matter to be searched for and seized. Appellants complain that the judge below had only a limited time at the *ex parte* hearing during which to scrutinize the example books furnished him preliminary to issuance of the warrant. In support of his contention that this prevented the Court from having a reasonable basis to believe the books named in the Information were obscene, appellants cited a New York case (*People v. Bantam Books* and *People v. Carr*, 172 N.Y.2d 515). That case, of course, was a criminal prosecution with the destruction of the books ancillary thereto, and the quoted matter in appellants' brief shows that the matter before the New York court was whether or not all the members of the grand jury had sufficient time to read the book concerned prior to returning an indictment. The judge issuing the warrant in the instant case states in his preliminary finding that he scrutinized the books tendered to him (R. 5). The *ex parte* hearing at which this finding was made commenced at 8:30 p.m., July 25, 1961 (R. 5). However, the record further shows that the Court was furnished the Information and the example books at the judge's home at about 5:00 o'clock p.m. of the same day (R. 22). The Court had only to find reasonable grounds or probable cause to believe the books named in the Information and warrant were obscene (79 C.J.S. 872, *Searches and Seizures*, Sec. 74f).

Appellants' second proposition for the infirmity of the warrant (to wit, that before a warrant issued in such case there must be a notice and adversary hearing)

is so novel as to make authority for or against said proposition almost non-existent. Search warrants of all kinds traditionally are issued as a result of *ex parte* proceedings (79 C.J.S. 866, *Searches and Seizures*, Sec. 74c) and usually in considerable secrecy. The reason for this is patent. If in fact the material to be searched for and seized is obscene material or gambling paraphernalia, the persons possessing it would need no finer insurance against prosecution or even loss of the property than prior notice that the state had discovered the whereabouts of such contraband.

Our statute provides that execution of the warrant shall be accompanied by notice to the owners or custodian of any material so sought of a hearing at an early date, but requires ten days' notice. Perusal of the record will show that any delays in the hearing in the instant cause on the merits were occasioned by Appellants through the filing of sundry motions, including a motion for continuance (R. 9, 11, 12).

At no place does the record show Appellants to have been deprived of an opportunity to be heard on any matter filed by them nor any delay in the trial and decision on the merits occasioned by the state or by the Court. Thus, all the requirements set up by this Court in *Marcus* have been met.

One of these requirements certainly cannot be said to have been notice and hearing before issuance of the warrant.

CONCLUSION

In view of the foregoing, it is urged this Court should dismiss Appellants' appeal herein for want of a substantial federal question.

Respectfully submitted,

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APPENDIX

From *LIFE* Magazine, Sept. 27, 1963
EDITORIALS

Is Any Book Legally Obscene Any More?

A first-class book critic, Stanley Edgar Hyman, recently gave his readers in *The New Leader* a systematic "Defense of Pornography." Reviewing a couple of books which he found obscene, worthless and "suppressible under the law," he added that "the law is wrong. Neither book should be banned. In fact, no publication should be banned." He went on to defend pornography for the reason usually held against it, namely that it induces lascivious thoughts and (possibly) behavior. Even books without literary merit are either "harmless or beneficial" to a society which, said Hyman, suffers from too much guilt about sex.

That's the unorthodox view of a literary man. But a few days later a New York Supreme Court Justice, J. Erwin Shapiro, said almost the same thing in an official decision. He had before him a batch of books which he called "profane, offensive, disgusting and plain unvarnished trash" but refused to call legally obscene. The judge's reasoning should be of interest to parents as well as lawyers and publishers.

In the Roth and Alberts cases (1957) the U.S. Supreme Court gave its first official definition of obscenity. It extended the protection of the First Amendment to "all ideas having even the slightest redeeming social importance," the lack of which is one test of obscenity. The other is whether "to the average person, applying con-

temporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." On this test the Court declared the material then before it obscene, although Black and Douglas dissented on the ground that "the test that suppresses a cheap tract today can suppress a literary gem tomorrow." The Shapiro decision turns their apprehension upside down.

Reluctantly, Shapiro felt obliged to read some 25 pieces of lewd trash (*Sex Kitten*, *Hill-billy Nympho*, etc.) and be their critic "because the law in its present state requires just that." The books all had the same plot (which Shapiro described as "from puberty to prostitution") and no pretense of literary merit. In that respect they differed from Henry Miller's *Tropic of Cancer*, which has litigated its way to freedom in several states because critics have persuaded the judges of Miller's "serious purpose." Indeed the trend of obscenity decisions is such that no work of recognizable literary merit, whatever its lingo or subject, is in much danger of suppression if its publisher is willing to fight for it in court. Now, if the Shapiro view holds, works of no merit are equally safe:

Is obscenity, then, an obsolete concept? Not quite. Even Shapiro made a point of the absence of four-letter words in his bundle of trash (another difference from Miller) and said the books were not "hard-core pornography." But he rejected the "literary merit" argument on the democratic ground that the mean and uneducated who "cannot cope with anything better" than trash are entitled to their "escape from reality." He met the "contemporary community standards" test by deciding that these are pretty low. His decision, obviously, is not going to make them any higher.

The history of literary censorship is not a pretty one. Shelley, Walt Whitman, Shaw, Dreiser, D. H. Lawrence,

Joyce, are just a few of the great writers who have been pronounced unprintable by one official bluenose or another. But Anthony Comstock has been dead since 1915, and the U.S., thanks largely to the Supreme Court, is now almost censor-free by civilized standards. This widening of freedom has been good for art, letters and our cultural level.

An ideal society would let anything be printed. But so long as professional pornographers exist, no state is likely to repeal its obscenity statutes. And there is danger that if our courts become too permissive, a public reaction will bring Comstock roaring back from his grave.

Definitions of obscenity—even of “hard-core pornography”—are inherently imprecise and changeable. But besides the lack of “redeeming social importance” there is another test which Warren relied on in the Roth case. It is the motive of the purveyor—what Frankfurter once called “dirt for dirt’s sake, or more exactly for money’s sake.” Although reputable publishers and authors are doubtless guilty of this motive in isolated passages, a discriminating judge should be able to recognize pure dirt from its total lack of other values or motives, and acknowledge that the public has a right to keep it off the street. The Shapiro doctrine is too permissive and should not survive.

Summary of the Seized Books.

Here follows a brief summary of the seized books with the page of beginning of some of the obscene passages indicated.

The State has included excerpts from a few of them to demonstrate the tenor of the seized books.

1. “*Born for Sin*”, by Al James, No. NB 1510R.

A nymphomaniac who works her way from small town truck stop to the big city and back peddling her body.

Obscene passages are to be found at pages 12, 32, 33, 42, to 45, 52, 53, 65, 66, 93 to 95, 109, 110, 132, 147, 148, 169.

2. *"No Longer A Virgin,"* by John Dexter, No. 1513R.

This is a story of a small-town girl who lives only for those moments when men's hands, sometimes several pairs, are caressing her body, particularly her overdeveloped breasts. When she fails to reach an orgasm with the hometown boyfriend, she moves to the large city where her aspirations are many times fulfilled.

Descriptive passages:

Perfect figures—pages 5, 8, 21.

Nymphomania—pages 5, 6, 7, 10.

Defloration—7, 8.

Narcissism—10-12.

Perversion—22, 41.

Descriptive intercourse—22, 23, 38, 118, 135, 153, 165,

189.

Lesbianism—pages 75, 76, 77.

Sadism—page 81.

3. *"Sin Girls,"* by Marlene Longmon, No. 1514R.

The general theme of this book is lesbianism. Pertinent pages for descriptive pages of lesbian acts are the following: Pages 6, 8, 9, 11, 19, 21, 22, 23, 24, 26, 27, 42, 43, 44, 51, 52, 53, 55, 56, 57, 64, 65, 66, 67, 68, 69, 70, 75, 77, 78, 79, 94, 95, 96, 97, 103, 107, 108, 109, 120, 121, 122, 123, 124, 168, 169, 177. At Page 191, which is the final page of the book, the principal character is rescued from lesbianism by a heterosexual affair.

The book is an example of masochism and flagellation. The following is a passage beginning at page 77:

"Eyes wide, Leslie watched. Gladys wore a thick, heavy cowhide belt in her trousers. She removed it now, doubling it and brandishing it. Understanding, Ronnie cowered back against the wall.

'No!' Leslie cried. 'Don't let her do it!'

'Quiet,' Laura ordered. 'This is between Gladys and Ronnie. Just watch.'

The belt licked out suddenly. It whicked across Ronnie's breasts with a resounding cracking sound. The belt snapped back and there was a livid mark across Ronnie's left breast, a long thin line snaking over the nipple and around into the beginning of her armpit.

Ronnie began to whimper. The belt snaked out again, and its tip lashed the soft flesh of Ronnie's belly. She spun around wildly, and the next merciless blow fell across the ripe quivering flesh of her buttocks, and then another immediately afterward snapped round the back of her thighs, the tip of the belt going between her legs. Ronnie tumbled to the floor, begging hysterically for mercy, and Gladys stood over her like some dark avenging angel of fury, her muscular arm rising and falling in an inexorable rhythm, and each descent bringing a fresh scream from the writhing girl on the floor."

4. "Sin Hotel", by Don Holliday, No. 1518R.

This is a story of mixed prostitution, lesbianism and homosexuality. Particularly descriptive passages are to be found on pages 12, 13, 15, 19, 35, 49, 53, 56, 79, 84, 90, 92, 102, 105, 117, 120, 131, 134, 168, 183. Total number of pages, 191.

5. "*Miami Call Girl*", by John Dexter, No. 1519R.

The story of a Miami Beach prostitute, with obscene descriptive pages on pages 14 to 19, 33 to 34, 38 to 42, 82 to 84. It has 191 pages.

6. "*Lesbian Love*," by Marlene Longmon, No. 1523R.

Following her seduction by her female school teacher, the heroine tries heterosexual activities but returns to her first love, lesbianism.

Descriptive passages:

Perfect figure—5, 6.

Lesbianism—6, 7, 8, 49, 55.

Descriptive heterosexual love—12, 22, 67, 149.

Statutory rape—22, 90.

Homosexuality—page 116.

7. "*Sex Jungle*", by Don Elliott, No. 1524R.

This is a story of juvenile gangs in New York and the sexual activities of these gangs, with an admixture of incest. Obscene descriptive pages are pages 6, 8, 45, 50, 52, 80, 81, 84, 91, 106, 108, 109, 113, 117, 119, 120, 132, 161, 165, 175. Total pages, 191.

Chapter six beginning at page 73 and continuing to page 85 is a description of Golden Dragon gang initiation. The initiate is required to have intercourse with three of the gang's girls while the rest observe. Excerpts are as follows:

"I was quiet for a minute. Hell, laying three girls in a row isn't the easiest thing in the world to do. And doing it in front of a mixed audience was a bitch of a job. But we had done plenty of fooling around in the Shining Sinners. Orgies, the newspapers would call them. Ten or twelve couples all naked, doing it

at the same time. That wasn't quite the same thing as what I was asked to do here. But other times we had screwing exhibitions, and me and Flora had had our turn at them while the rest of the gang and the debs stood around and watched and made bets and all. So I wasn't embarrassed by the idea, if you get me. Just a little worried. I wanted everything to work out right.

* * *

"But one rule around a gang is that the deb is her stud's property. When a caper is planned, the deb don't raise objections. Once she hooks up with a gang kid, she does what he wants. And if he wants her to strip down and lay publicly for a stranger, she does it—or else.

* * *

"Lora first," I said.

* * *

"Lora started to strip. She pulled her black jersey up over her head and dropped it to one side. She didn't have any bra on underneath, and her big breasts swung from side to side. They were the biggest I'd ever seen. Huge. They had little dimples in them, they were so big. They started right below her collarbone and must have gone a foot down her chest, as well as sticking out a foot.

"She stood there with those enormous boobs sticking out, and every eye in the room fastened right on her.

* * *

"I tightened on her breasts, feeling my fingers sink deep into their spongy fatness, and I lowered my head to her shoulder and took a bite out of her, and I drove myself deep into her . . .

"And she came alive.

* * *

"Which girl next?" Jimmy Nails asked.

* * *

"Joanne came forward. She was very nervous, I could tell. Close up, I saw that she couldn't have been much more than fourteen or fifteen at the absolute tops.

* * *

"We moved slowly at first, then faster, and I felt the tingling begin and knew that this was going to be a fast one for me, and I tried to heat her up, doing everything I could for her, only nothing seemed to get through to her.

* * *

"Somebody offered me a can of beer and I took it and drank about half of it. Then I turned, looking for Lisa. She was sitting on the couch, and when I looked at her her face put on an interesting smile. Christ, she was beautiful. Sleek and smooth and soft and satiny, and a mischievous look in her eyes.

"Come on," I said to her.

"She rose and came over to me. 'Do you want me to undress?' she asked.

"I'll undress you," I said.

* * *

"I pulled the sweater over her head. She was about five six or so, a tall girl. I took the sweater off her and unhooked her bra, bringing it forward off her breasts.

"She was built.

"Her breasts rose high and firm, and they were pale white, sort of creamy color with a glow of their own. The nipples were small and pinkish-red, and they sat near the top of the curve, looking up at me. My hands shook a little as I put them on those two round ripe boobs of hers.

"This was plenty woman, all right. Mike Reilly had himself quite a piece.

* * *

"Her fingers wandered magically. I began to breathe harder. I had my hands on her breasts, and the nipples were stiff against my palms, and I was looking into her eyes and seeing strange flecks of gold there, and our bodies were very close and yet still I was helpless, but the excitement was growing in me, growing by the minute as she used all of her skill, and then we were kissing, her tongue like a hot dart in my mouth.

"And it began to happen.

"I don't know the exact moment. One moment I was helpless, and the next I was on fire, burning up in the flame of her body, entering her, and she was moving, doing things with the muscles inside her, and when I opened my eyes for a moment I saw her with her eyes closed and still smiling, and then her fingers were raking line down my back and she was starting to moan, and I was carried away with her as sounds started to come out of her throat and mine, and it was like this was the first time I had ever done it with a girl, and the world was full of light and I felt the shudder of delight and rockets going off inside my head, and Lisa was stiff against me, her whole body shaking with pounding delight, and I felt it flowing through me like an electric current, and it was oh and oh and oh again, the current flowing through both of us, jolt after jolt, after jolt, and we were way up far out, and then it was ending, hard as we tried to hang onto it, it was ending, and down we came out of the stratosphere and it was all over, and I gasped for breath and pillowed down between Lisa's wonderful breasts and shook with exhaustion.

"I was beat.

"But I had passed the test."

His sister is also initiated. At page 105:

"All it was, was Johnny and Sis on the mattress with each other. But for me it took hours. It's a hell of a thing to watch your sister, giving an exhibition in front of a couple of dozen strangers. And Sis was good. She wasn't any scared virgin. She forgot all about the audience, and really cut loose with Johnny Slash."

8. "*The Lustful Ones*", by Clyde Allison, 1525R.

The theme of this is sex orgies in Greenwich Village, New York, New York. Obscene descriptions commence on Page 19, and continue on at 65, 101, 137, and 159. Total pages, 191.

9. "*The Wife Swappers*," by Andrew Shaw, No. NB-1526R.

The story concerns a suburban sex club consisting of eight perfectly-developed, sexually insatiable couples. The erotic play during the frequent orgies includes both heterosexual and homosexual activities.

Descriptive passages:

Perfect figures—5, 59, 66.

Descriptive intercourse—18, 21, 67, 84, 93, 119.

Sadism—22, 31, 68.

Nymphomania—27, 92.

Lesbianism—39, 41, 82, 85, 119.

Perversion—80, 82.

Sodomy—page 155.

10. "*Sex Model*", by Al James, No. NB1527R.

Central theme of this book seems to be vast number of obscene descriptions of the sex act, including rape. Pages at which obscene descriptive passages appear are 7, 8, 9,

10, 11, 16, 17, 18, 36, 37, 38, 39, 57, 58, 59, 66, 67, 84, 85, 86, 101, 102, 103, 111, 112, 128, 131, 136 to 137, 167 to 172, 178, 182, 183. Total pages, 191.

11. "*The Lecher*," by Don Elliott, No. NB1528R.

The protagonist in this story is an IBM operator who seduces a man and his son with the ardor of a nymphomaniac. Her desires are insatiable, while her playmates' abilities to perform sexually are immeasurable. Continuous intercourse is the yardstick of happiness.

Descriptive passages:

Perfect figures, descriptive nudity, pages 7, 14, 16, 47, 58, 110.

Nymphomania—12, 13, 14, 24, 48, 124.

Descriptive intercourse—30, 31, 32, 48, 108, 124, 125.

Indirect incest—95, 105, 126.

Perversion—66.

Sadism—189.

12. "*Lust Goddess*," by Don Elliott, No. NB1544.

With a theme of nymphomania and sadism, this story describes sexual excess by supersexed males and insatiable females. The heroine is consumed with a compulsion to control all males with whom she comes in contact.

Descriptive passages:

Perfect figure and descriptive nudity—6, 9, 12, 20, 47, 73, 110.

Nymphomania—10, 19, 55, 79, 180-185.

Descriptive intercourse—20-22, 55-57, 80, 98-100, 113, 132.

Sadism—63, 141, 148, 151, 153, 176, 188.

Defloration—116.

13. "*Sin Camp*", by Anthony Calvano, No. NB1545.

Theme is one of illicit sex at an army camp. It is pre-occupied with sadism and sex orgies. Descriptive pages of obscene nature come at Pages 55, 75, 109, 110, 157, 174, 143, and 149. Total pages, 190.

14. "\$20.00 *Lust*", by Andrew Shaw, No. NB1546.

The central theme is prostitution, with descriptive pages of the sex act commencing at Page 35, and continuing at 81, 159, 187, 188. It contains references to counterfeiting. Total pages, 190.

15. "*Convention Girl*", by Don Elliott, No. NB1547.

The central theme is that of a convention call girl and kept woman, with overtones of adultery and murder. Descriptive passages at Pages 13, 15, 25, 26, 27, 28, 33, 38, 39, 44, 68, 74, 75, 76, 77, 100, 101, 102, 103, 108, 109, 110, 111, 119, 124, 125, 126, 127, 131, 142, 143, 147, 148, 150, and 183. Total pages, 189.

16. "*The Isle of Sin*", by John Dexter, No. NB1549.

The central theme of this is sex by beatniks on a vacation island. Descriptive passages are on Pages 9, 23, 48, 49, 83 to 85, 121 and 122, 131 and 132, 177 to 179. Total pages 190.

17. "*Orgy Town*", by Will Newbury, No. NB1550.

While on a mission to rescue a wayward girl, for which he has been paid by sexual access to the sister, the central character visits teenage vice dens and takes part in orgies in the bushes, on the beaches and in bedrooms.

Descriptive passages:—

Perfect figures, descriptive nudity—pages 30, 31, 40, 73, 136.

Descriptive intercourse—72, 124, 125, 181, 182.

Nymphomania—pages 72, 122.

18. "Sex Spy", by J. X. Williams, No. NB1552.

The story about a female spy in a Latin American country. Descriptive passages are at Pages 35, 38, 46 through 49, 62 to 64, 66 to 69 (attempted rape), 82 to 84, 97 to 98, 104 to 109, 120 to 123 (sadism and rape), 134 to 135, 143, 148 to 150, 165 to 166, 177 (lesbianism) and 190 to 192. Total pages, 192.

Sadism is herein graphically portrayed beginning at page 119:

"The eyes of the soldiers gleamed moist with lust as they watched Glory awaken. Glory knew she was nude, knew her moist intimate areas were fully exposed, but she did not care.

* * *

"Bols said. 'Are you awake, Senorita Carter? Ah, I see that you are. Will you answer a question or two?'

* * *

"Bols leaned forward to await her reply. Glory spat directly in his face.

* * *

"Very well, Senorita Carter. Pepe, give her a taste. Arnolfo, you and Grigori hold her down.'

* * *

"Again Glory snapped her head forward and spat at him. Bols raised a sleeve to wipe his cheek.

"That is your answer, is it?" he said in a velvet whisper. 'Pepe? Burn her . . .!'

"Pepe extended the lighted twist of straw to touch Glory's breast. She screamed.

"Pepe stamped the twist under his boot, selected another and held it close to the lantern. His gross lips shone with saliva through the matted filth of his beard.

"'Those soft lovely nipples,' Bols said. 'Imagine how they will look blackened and scarred. No man will want to fondle them or kiss them. Your name! Your real name!'

. . .

"Glory writhed, struggled to get free as the flame hovered close. It sent searing agony through her, agony that poured out of her lips in a long, shrill shriek of pain. She collapsed weakly between her captors, hoping they'd let her rest a moment.

"'Let us try a more intimate area,' came the voice of Bols. 'Arnolfo . . . Grigori . . . hold her arms with one hand. Excellent. Ready, Pepe? Get the twist lighted. There. Now, gentlemen, a hand on the young lady's thighs. Pull them apart. . .'

"'Oh, my God, my God, no!' Glory screamed. 'You can't you wouldn't. . .'

"'I will unless you tell me what I wish to know, Senorita.'

"'Oh, God, oh, God, no please, please don't . . .'

"'Pepe?'

"'No, no, don't burn me there, don't burn me th . . . AAAAAAAAA . . .'

"The revolting stench of smoldering flesh gagged Glory, turned her sick and weak. The smell and the pain plunged her down, down, into black and bottomless oblivion.

"But once more she came awake, wishing for death now, wishing for release. Through the blur of her pain-dimmed vision she saw Bols' face like a phantom in a trick mirror, elongated and hideous, the mouth working in a mocking smile.

"'You are a remarkable young woman. You have been trained. No ordinary American girl would

withstand such pain without speaking. But we shall have plenty of time. Senorita, please pay attention!"

"A hand knotted in her hair, jerking her head up. Three stinging slaps brought her eyes flying open.

"'Better,' Bols purred. 'Since our questioning will obviously take longer than I had planned, perhaps I should call a halt and give my faithful helpers a chance to appreciate your distinctive charms for themselves. Pepe? Shall you be first to invade the portals of joy?' Gazing up through a lock of hair falling across her forehead Glory could see the bearded Pepe shuffle forward along the truck bed, toying with his belt as he licked his lips. Bols picked up the lantern, held it high. It swayed back and forth with the rhythm of the truck bouncing over a bumpy road.

"'Grigori, you and Arnolfo should assist our friend, to assure the young lady's cooperation. Be prompt, Pepe. We cannot have too many more miles to go.'

"Glory tried to scream again, scream and clamp her thighs tight together as Pepe's nailed boot stamped cruelly between them and forced them apart. Then he dropped to his knees, put one hand on each of Glory's knees, slowly wedged them wide.

"The other two soldiers dropped to a crouch, one on either side, holding her legs wide, keeping her shoulders pinned to the foully matted straw. Bols' twisted face retreated in her vision, a surrealistic nightmare under the swinging beam of the lantern.

"'Be quick,' he laughed, 'be quick, comrade Pepe. Your actions will arouse our brothers, who wait their turns. And do not be easy, comrade Pepe.' His voice quaked uncontrollably: 'Rape her!'

"Now Pepe's loathsome bearded face descended over Glory's. She writhed, tried to fight, but pain had taken its toll. In one final instant of agony Glory screamed Antonio Rey's name, but it came out a wordless syllable. With brutal strength, Pepe assaulted her. As his fellows began to cry their encouragement Glory's mind again went mercifully dark."

As is flagellation at page 156:

"Stretched on her belly on the floor, Glory saw his arm raise up. She raised her own hand protectively.

"'Antonio! In the name of God, darling . . .'

"Crack! /

"Glory screamed and twitched across the floor. The whip had cut the straps of the slip, ripped the bodice to tatters. Her pulsing white breast heaved up into the light. A tracery of blood was cut across their upper surfaces.

"Glory moaned, rolled from side to side, digging her fingernails into her thighs to stifle the pain. The whip hissed along the floor as Antonio coiled it. His arm flashed up. His mouth contorted in rage:

"'You'll never use your body again. Never again . . .'

"Crack!

"The lash coiled around Glory's buttocks, tore free, cutting her slip to ribbons. It left another red mark across her belly and the rounded bulges of her quivering buttocks.

"Glory tried to crawl away. The pain was too severe. She could not speak. Words choked in her throat. She waited the next blow, wishing it would strike her dead. Everything was finished now, destroyed. Feebly she pressed her hands over her loins, trying to protect herself. The whip hissed coiling . . .

"Crack!

"Crack!

"A long, piercing scream tore out of Glory's throat. She went scrabbling over the floor, her breasts criss-crossed with whip-marks. Bloodstained her nipples, trickled down her belly, marked her thighs and buttocks."

And desire for seduction at page 149:

"Darling . . . my darling . . . have me, my darling . . . I ache . . ."

"Querida,' Antonio's voice whispered down the dream-wind, 'Queida, I want you so . . .'

"Don't make me wait. Antonio . . . give me your love . . . let me have your love . . . oh, please . . ."

"Yes, Querida, yes, I'll give it to you . . . let me be gentle as I give . . ."

"No, Antonio . . . oh, darling no. I have to love you hard, hard . . . please, Antonio . . . lover . . . it's like fire . . . I can't wait . . . please, sweetheart, give . . . ohhhhhh! Oh, yes, yes, that's it, that's it, my darling, my lover, my darling . . ."

And perversion beginning at page 105 through 109:

"Hurt me . . . hurt me, I don't care . . . just start . . . start . . . or . . ."

Bols arms went around her like a vise.

"Then you have been warned."

"That's it, yes . . . yes . . . oh, yes, that's wonderful, that feels . . . Bols! Bols, what are you . . . no, Bols . . . no. I won't . . . not that . . . I won't let . . . Bols . . ."

"Glory's fists beat at him, hammered at him mercilessly. He pressed on, his strength overpowering. The spasm which seized Glory was an evil thing, foul and loathsome as Bols caressed her with never a trace of emotion on his stark, sweat-dripping face.

"Again Glory tried to struggle, but her balled fists beat ineffectually at his shoulders.

"Bols . . . you mustn't . . . Bols . . . don't . . . don't . . . ah, God, Bols, stop, stop . . . stop . . . stop before you . . . agh!"

"Tell me to stop," Bols snarled. "Tell me you really want me to stop."

"Yes, . . . ah . . . ah . . . oh God . . . the hurt I can't bear . . . I . . . won't."

"'Shall I stop?'"

Bols' voice came like thunder, mocking her, making her filthy, a degraded thing.

"'Shall I stop now, my darling Jean? Or shall I go on to the end? If you say stop . . .'"

"'Yes you must . . . you . . . what's happening to me?'"

"'Do you want me to go on? Do you want me to go on, Jean? Do you? DO YOU?'"

And with terrible wanton abandon Glory opened her lips and screamed:

"'Yes . . . yes . . . yes . . . it's too late . . . go on! go on, go on!'"

* * *

Never in her life had Glory Hill felt so soiled, so thoroughly degraded.

"Bols left her sprawled naked. Distantly she heard his mocking laugh."

19. *"Trailer Trollop"*, by Andrew Shaw, No. NB1553.

The theme is adultery, prostitution and statutory rape, with smatterings of lesbianism at an army base. Theme includes abuse of prostitute by men which forces her to try lesbianism, but in the end virtue triumphs and she returns to illicit heterosexual sex. Obscene passages occur at Pages 29 and 30, 34 and 35, 58 to 60, 105, 106, 111 through 113, 119, 126 to 129 (violent sadism). Total pages, 192.

20. *"Flesh Is My Undoing"*, by Clyde Allison, No. NB-1555.

Surrounded by lust-driven females at a weekend sex party, the protagonist takes time to make love to all guests, who trade partners in the continuous game of musical bedsprings, while endeavoring to crack a sex-badger racket.

Descriptive passages:

- Perfect figure—pages 27, 99.
- Descriptive intercourse—27, 28, 48-50, 57, 68, 79, 99, 142.
- Nymphomania—62, 79, 148, 179.
- Statutory rape—98.
- Rape—185.
- Sadism—162, 183, 185.

21. "Sex Circus", by John Dexter, No. NB1556.

In his new position as circus roustabout the central character learns his duty consists primarily serving as a "stud" to the female performers, all with insatiable sexual appetites and voluptuous figures. He is also a target for the sadistic expression of two homosexuals.

Descriptive passages:

- Perfect figures—pages 8, 45, 149.
- Descriptive intercourse—32, 33, 70, 71, 83, 84, 132, 148, 150.
- Perversion—46, 69, 123.
- Sadism—92, 133.

22. "Malay Mistress", by Clyde Allison, No. NB1557.

The central theme of this is an American man in the Orient, participating in oriental sex, including perversions. Obscene passages at Pages 7 to 10, 30 to 42, 63, 64, 65, 102, 103, 104, 132, 133, 134, 171, 172, 173, 174, and 175. Total pages, 190.

23. "The Sinning Season", by Tony Calvano, No. NB-1561.

Central theme is adultery and sex at a hunting lodge in the north woods. Obscene passages at Pages 19, 51 to 55, 78 to 79, 130 to 132, 137, 138. Total pages, 190.

24. "*Sin Song*", by John Dexter, NB 1562.

In this story of a two-dollar-a-fall prostitute's rise to a "Sexpot" rock and roll singer, sexual activity is accepted by the characters as being commonplace as sitting down and with no greater morality involved. Love is not an issue; neither is possible pregnancy. Sexual exhaustion is unheard of as the supersexed males, the nymphomaniac females, all with perfect, overdeveloped figures and glands perform from various positions with little emotion except lust.

Descriptive passages:

Perfect figures—pages 5, 15, 83, 112, 117

Supersexed males—pages 11, 21, 75, 113.

Nymphomania—pages 18-19, 37, 112, 118

Criticism of accepted morality—20, 22.

Sadism—20, 92, 108, 182.

Homosexuality—116.

25. "*Passion Slaves*", by Andrew Shaw, No. NB1563.

This is a story of a teenage girl who flees the passion of her school teacher to become a prostitute in a large city. The girl, equipped with overdeveloped figure and drives, enjoys sexual activity so much she carries on her wanton adventures for either pay or play.

Descriptive passages:

Perfect figure—pages 6, 14, 17, 22, 81, 93, 122.

Descriptive intercourse—22, 32, 96, 111, 112-113.

Nymphomania—13, 17, 21, 31, 84, 94, 126, 142, 149.

Incest—81.

Sadism—115.

Lesbianism—152.

Rape—152-153.

26. *"The Sinful Ones"*, Don Elliott, No. NB1564.

American in Italy on summer vacation participating in Continental sex experiences. Descriptive passages on Pages 26 to 27, 37 to 38, 47, 61 to 62, 98 to 102, 109 and 110, 134, 135, 158 to 161 (lesbianism), and 188 and 189. Total pages, 190.

27. *"Lover"*, by Andrew Shaw, No. NB1551.

This story is concerned with a 19-year-old male whose who develops his profession in the slums of New York and rises to the penthouses of Fifth Avenue. Sometimes he is paid for a brief house call and on other occasions makes a handsome fee by servicing several lusty females during all-night orgies.

Descriptive passages:

Perfect figures—pages, 16, 17, 35, 37, 68, 102, 144.

Descriptive nudity—pages 18, 19, 20.

Lack of love—16, 20, 21, 24.

Descriptive intercourse—pages 21, 23, 39, 40, 71, 102, 104, 143.

Supersexed male—24, 180.

Defloration—24, 74.

Statutory rape—72-73.

Lesbianism—pages 113-114.

Orgies—pages 171, 180.

Homosexuality—189.

28. *"Love Nest"*, by Tony Calvano, No. NB1559.

The theme of this book is a husband whose wife is frigid, who seeks satisfaction of sexual desires with other women. Obscene descriptive passages will be found from Pages 12 to 13, 22 to 34, 39, 49, 50, 61 to 66 (overtones of incest), 69 to 72, 93 to 96, 101 to 103, 125 to 127, 151 to 153. Total pages, 190.

29. "*Passion Trap*", by Don Elliott, No. NB1521R.

The theme of this is a college professor studying for his graduate degree, who is in love with a frigid girl, who exercises his sex lust on a waitress who is beneath him. After a long and torrid affair he finally wrenches himself away to the highly educated, intellectual woman, who is his mental equal, and overcomes her frigidity in an illicit connection. Obscene passages appear at Pages 37 to 41, 71 to 77, 83 to 85, 122 (rape), 134 to 136, 172, 173. Total pages, 191.

30. "*Sin Cruise*", by Don Elliott, No. NB1554.

Theme of book is bachelor on cruise in Mediterranean participates in number of sex orgies with super abundance of unattached females aboard. Overtones of adultery. Also orgies with sisters. Descriptions start at Pages 26 through 29, 36, 56 to 60, 99 to 100, 109, 134 to 136. Total pages, 190.

31. "*Seeds of Sin*", by Louis Lorraine, No. NB1560.

Theme is a college professor making survey of women's sexual habits. Having a frigid wife, he has an affair with a woman encountered in the course of survey. Descriptions on Pages 42, 58 to 60, 68 to 71, 102 to 106, 186 to 189. Total pages, 190.

Each of the foregoing books bears the notation: "This is an original Nightstand Book."

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October Term, 1963

No. 449

A Quantity of Copies of Books, HAROLD THOMPSON
and ROBERT THOMPSON, dba, P-K NEWS SERVICE,

Appellants,

vs.

STATE OF KANSAS,

Appellee.

On Appeal From the Supreme Court
of the State of Kansas.

BRIEF FOR THE APPELLANTS.

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SUBJECT INDEX

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I.

The absence in the Kansas statute herein of a right to jury trial, and the refusal to grant appellants' request for a jury trial and jury determination of the issue of obscenity, renders the statute unconstitutional on its face and as applied, in violation of the free speech and press and due process provisions of the First and Fourteenth Amendments	24
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II.

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IN THE
Supreme Court of the United States

October Term, 1963

No. 449

A Quantity of Copies of Books, HAROLD THOMPSON
and ROBERT THOMPSON, dba, P-K NEWS SERVICE,

Appellants,

vs.

STATE OF KANSAS,

Appellee.

On Appeal From the Supreme Court
of the State of Kansas.

BRIEF FOR THE APPELLANTS.

Opinions Below.

The opinion of the Supreme Court of the State of Kansas [R. 37-41] was divided, Justice Price and Justice Robb dissenting without opinion [R. 41]. The opinion is reported in 191 Kan. 13, 379 P. 2d 254. The memorandum decision of the District Judge [R. 16-18] is unreported, but appears in its entirety in the aforesaid opinion of the Supreme Court of the State of Kansas [R. 38-40].

Jurisdiction.

This was an *in rem* proceeding [R. 35-36], instituted under the laws of Kansas (G. S. 1961 Supp. 21-1102 to 21-1102c, L. 1961, ch. 186, June 30) seeking the public destruction "by burning or otherwise" [R. 36] of certain specified books [R. 35] alleged to "contain obscene, lewd and lascivious language" [R. 36] and alleged to be, in their entirety, "obscene, lewd and lascivious, manifestly tending to the corruption of the morals of any person or persons reading said books" [R. 36].

The judgment of the Supreme Court of the State of Kansas [R. 41] was entered on March 2, 1963 [R. 37], and a due and timely motion for rehearing [R. 42-43] was denied on April 15, 1963 [R. 44]. Notice of appeal to this Court was due and timely filed in the Supreme Court of the State of Kansas on July 9, 1963 [R. 44-49]. The case was docketed in this Court on September 6, 1963. Probable jurisdiction was noted on November 18, 1963 [R. 50].

This Court's jurisdiction to review the judgment is conferred by 28 U. S. C. 1257(2). The judgment upheld the state statute against claims that on its face and as applied, the statute violated the Federal Constitution. The following decisions sustain the jurisdiction of the Court to review the judgment on direct appeal in this case: *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58; *Marcus v. Search Warrant*, 367 U. S. 717; *Kingsley Books, Inc. v. Brown*, 354 U. S. 436; *Dahmké v. Walker Milling Co. v. Bondurant*, 257 U. S. 282.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fourth and Fourteenth Amendments to the Constitution of the United States, and the pertinent provisions of the General Statutes of Kansas (G. S. 1961 Supp. 21-1102, 21-1102c, L. 1961, ch. 186, Sections 1, 4, June 30) are attached hereto as Appendix.

Questions Presented.

1. Whether the statute (G. S. 1961 Supp. 21-1102 to 21-1102c, L. 1961, ch. 186, June 30), on its face and as construed and applied, by reason of the absence of a provision for a jury trial of the essential issues thereunder, and by reason of a denial of a jury trial in the cause herein despite appellants' requests duly made, renders the statute unconstitutional because the statute, on its face and as so construed and applied, abridges appellants' exercise of freedoms of speech and press, arbitrarily deprives appellants of their liberty and property without due process of law, and discriminatorily denies appellants the equal protection of the laws contrary to the free speech and press, due process and equal protection provisions of the First and Fourteenth Amendments to the United States Constitution.

2. Whether the statute (G. S. 1961 Supp. 21-1102 to 21-1102c, L. 1961, ch. 186, June 30), on its face and as construed and applied to authorize the search and seizure of the books herein involved, constitutes a prior restraint on the circulation of books including the books involved herein, thereby abridging the exercise of free-

doms of speech and press including appellants' exercise thereof, all protected by the free speech and press provisions of the First Amendment and the due process clause of the Fourteenth Amendment to the Constitution of the United States.

3. Whether the statute (G. S. 1961 Supp. 21-1402 to 21-1102c, L. 1961, ch. 186, June 30), on its face, and as construed and applied to authorize the search and seizure of the books herein involved, deprives appellants of the right to be secure against unreasonable searches and seizures protected by the provisions of the Fourth Amendment and the due process clause of the Fourteenth Amendment to the Constitution of the United States.

4. Whether the statute (G. S. 1961 Supp. 21-1102 to 21-1102c, L. 1961, ch. 186, June 30), as construed and applied to authorize the search, seizure and destruction of the books herein involved by applying solely the contemporary standards of the community of Junction City, Kansas, in judging the alleged obscenity of the books, abridges appellants' exercise of freedoms of speech and press protected by the free speech and press provisions of the First Amendment and the due process clause of the Fourteenth Amendment to the Constitution of the United States.

5. Whether the statute (G. S. Supp. 21-1102 to 21-1102c, L. 1961, ch. 186, June 30), as construed and applied to authorize the search, seizure and destruction of the books herein involved without proof that the books go substantially beyond customary limits of candor in the description or representation of matters pertaining to sex and nudity and without proof in addition that the books appeal to the prurient interest of the

average person, abridges appellants' exercise of freedoms of speech and press, arbitrarily deprives appellants of liberty and property without due process of law, and discriminatorily deprives appellants of the equal protection of the laws, all in violation of the free speech and press provisions of the First Amendment and the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

6. Whether the statute (G. S. 1961 Supp. 21-1102 to 21-1102c, L. 1961, ch. 186, June 30), on its face, and as construed and applied to authorize destruction of the books herein upon the ground that the books are obscene and violate the statute, abridges the exercise of freedoms of speech and press including appellants' exercise thereof, protected by the free speech and press provisions of the First Amendment and the due process clause of the Fourteenth Amendment to the Constitution of the United States.

7. Whether the statute (G. S. 1961 Supp. 21-1102 to 21-1102c, L. 1961, ch. 186, June 30), on its face, and as construed and applied, by failing to provide any ascertainable standards under which men of common intelligence can know what is or is not permissible; by failing to contain any requirement of scienter; by failing to provide for a jury trial, and the denial of a jury trial duly requested by appellants; by authorizing a prior restraint on the circulation of books, including the books herein; by authorizing the search and seizure of books, including the books herein; by authorizing the search, seizure and destruction of the books herein involved, applying solely the contemporary standards of Junction City, Kansas, without any evidence that the

books substantially exceed limits of candor in the description or representation of sex or nudity or appeal to the prurient interest of the average person, the uncontradicted record in fact showing that the books do not; and by ordering the destruction of the books as allegedly obscene in violation of the statute, all operates and operated to deprive appellants of freedoms of speech and press, arbitrarily to deprive appellants of liberty and property without due process of law, and discriminatorily to deny appellants the equal protection of the laws, all in violation of the free speech and press provisions of the First Amendment, the search and seizure provisions of the Fourth Amendment, and the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

Statement of the Case.

(a) On July 25, 1961, an information, verified by William M. Ferguson, Attorney General of the State of Kansas, was filed in the District Court of Geary County, Kansas [R. 35-36]. The caption of the information was entitled in the name of the State, as plaintiff, against a quantity of books, the specific titles of each of the books, fifty-nine in number, being set forth in the caption, together with the statement that each of the specified books had been published as "This is an original Nightstand Book" [R. 35]. The information alleged that P-K News Service, located at 340 East 9th Street, Junction City, Kansas, possessed, or kept for sale and distribution on July 24, 1961, a quantity of paper-back books, "more particularly described by title in the caption hereof" [R. 36], which books allegedly contained "obscene, lewd and lascivious" language and which books were in their entirety alleg-

edly "obscene, lewd and lascivious, manifestly tending to the corruption of the morals of any person or persons reading said books" [R. 36], all as allegedly prohibited by the specified laws of Kansas.

The prayer of the information was that a warrant issue to the Sheriff of Geary County, Kansas, directing that the books be brought before the Court and that, after notice to the owner or other person in possession and control of said books of a hearing, and after such hearing, that the Court order the books publicly destroyed, by burning or otherwise [R. 36].¹

The information aforesaid having been executed by the Attorney General, an Assistant Attorney General was sent with the information for filing in Junction City, Kansas [R. 19]. On July 25, 1961, the information was filed in the District Court of Geary County, Kansas at about 5:00 P.M. [R. 19]. The Assistant Attorney General, accompanied by the County Attorney, then proceeded to the home of the Honorable Albert B. Fletcher, a Judge of the said Geary District Court, informed him of the information, and left seven books with him [R. 19].

At about 8:00 P.M. [R. 19] or 8:30 P.M. [R. 3], Judge Fletcher, the Assistant Attorney General and County Attorney met at the Court House [R. 19]. The Court's attention was called to certain pencilled references to certain sections in the seven books [R. 19].

¹The information was verified by the Attorney General "upon his information and belief." This verification is omitted from the printed record [R. 36] but appears in "Appellants' Supplemental Abstract and Brief" at page 3, on file in this Court. The parties have stipulated that they may refer in their briefs and arguments to any unprinted portions of the certified record that they may deem appropriate or necessary.

Two of the seven books had pencilled notations and some had slips of paper in them with pencilled notations of page numbers on them [R. 20]. The Judge perused one or more of the books for a short period [R. 19]. The hearing lasted about 40 to 45 minutes [R. 19].

Judge Fletcher stated, on the said July 25, 1961, that he had "scrutinized seven volumes" [R. 3]—six listed in the information, while one was not—and concluded as follows:

"The same appears to be obscene literature as defined under Chapter 186 of the Session Laws, 1961, and give this Court reasonable grounds to believe that any paper-backed publication carrying the following: 'This is an original Night Stand Book' would fall within the same category and would be contrary to said chapter of the Session Laws." [R. 3].

Based upon "the Information" and "The Court's scrutiny" [R. 4] of the said seven books, Judge Fletcher held that a search warrant should issue forthwith, and the Court set the matter for hearing for "the 7th day of August, 1961" [R. 4].

Thereupon, on the said July 25, 1961, a search warrant issued [R. 4-5]. The warrant recites that it appears from the Information that "quantities of lewd, lascivious and obscene books, more particularly described in the caption hereof" [R. 4] are possessed for sale and distribution at the specified address, and the command of the warrant is "forthwith to seize all copies of said described lewd, lascivious and obscene books and to bring said books before me at 10 o'clock

A.M. on the 7th day of August, 1961, for a hearing then and there to be held to determine what further disposition shall be made of such books" [R. 4]. The command was further to search the premises and buildings for such books as aforestated [R. 4-5], and to leave a copy of the warrant and notice with the owner of the books, or with any agent on the premises, notifying the owner of the hearing date on August 7, 1961, at which time the owner might show cause why the books seized should not be destroyed by burning or otherwise [R. 5].

Accordingly, on the next day, July 26, 1961, the search warrant was executed by searching the premises and seizing 1,715 books, being copies of 31 different titles [R. 5-6]. The return of the officer who executed the warrant recites: "The following is a list of the Titles and number of books having been published as 'This is an Original Nightstand Book,' seized and in my custody" [R. 5], followed by a list of the books containing the Publisher's number, the title of each book, and the quantity seized [R. 5-6].

(b) On August 7, 1961, appellants filed their motion to quash the search warrant and Information [R. 7-9]. The grounds of the motion were that the statute on its face and as construed and applied to the books involved were in violation of the state and Federal constitutions [R. 7]; that the statute, on its face and as construed and applied, deprived appellants of their property without due process of law, denied them the equal protection of the laws and freedoms of speech and press, "all contrary to the provisions of the 14th Amendment of the Constitution of the United States and Sections 11 and 18 of the Bill of Rights of the

Constitution of the State of Kansas" [R. 7]; that the books are not obscene, immoral, lewd or lascivious, nor contain such language, and are entitled to constitutional protection under the "1st and 14th Amendments to the Constitution of The United States and Section 11 of the Bill of Rights of the Constitution of the State of Kansas" [R. 7].

It was further urged in the motion to quash that the statute failed to provide ascertainable standards, and that the breadth of the statutory language encompassed constitutionally protected books, and the statute therefore, on its face and as construed and applied, abridged freedoms of speech and press, deprived appellants of their property without due process of law and denied them the equal protection of the laws, all in violation of "the 14th Amendment of the Constitution of the United States and Section 18 of the Bill of Rights of the Constitution of the State of Kansas" [R. 8].

The motion also asserted that the statute permitted the seizure of books without prior notice to the owner and without hearing or determination that the seized books are obscene; that the procedures employed to seize the books herein involved operate "as a prior restraint on the circulation and dissemination of books" [R. 9]; that the statute does not provide a limitation upon the time within which a judicial decision must be made on the issue of obscenity, thereby arbitrarily depriving appellants of property without due process of law, denying them equal protection of the laws and freedom of speech and press, "all contrary to the 14th Amendment to the Constitution of the United States and Sections 11 and 18 of the Bill of Rights of the State of Kansas" [R. 9].

Finally, the motion to quash asserted that the statute on its face and as construed and applied to the books involved authorizing and requiring the seizure of the books is arbitrary and unreasonable and deprives appellants of their right to be secure against unreasonable searches and seizures "secured by the 4th and 14th Amendments to the Constitution of the United States, and Section 15 of the Bill of Rights of the Constitution of the State of Kansas" [R. 9].

Following the filing of the said motion to quash on August 7, 1961, and on the same day, a hearing was held where appellants introduced evidence with respect to the manner in which the Information was executed and filed on July 25, 1961; the nature of the proceedings before Judge Fletcher in the evening; and identified the seven books which the Court had scrutinized prior to the issuance of the search warrant, all as aforestated [R. 19-21]. Following oral argument, the Court took the matter under advisement [R. 21].

On August 11, 1961, the Court ruled on the motion to quash [R. 21-24]. The District Court stated at the outset that the motion "goes to the procedure used by this Court and to the Act itself as construed in line with the 14th Amendment of the United States Constitution and the 11th and 18th Bill of Rights of the Constitution of the State of Kansas and also the 4th and 14th Amendment to the Constitution of the United States and the 5th Article of the Bill of Rights of the State of Kansas" [R. 21]. The Court held that the statute on its face did not deprive appellants of due process of law nor act as a prior restraint on the dissemination of publications [R. 21-23].

The Court stated that due process was not violated by the procedures used to seize the books; that there

was basis for the exercise of judicial discretion prior to the issuance of the search warrant when the Court "read six—I beg your pardon—scrutinized six volumes, all bearing the same notation 'Nightstand Publications'" [R. 24], and the District Court concluded "that the procedure and act done by this Court are sufficient so as not to violate the due process clause of the Constitution of the United States or of the State of Kansas and the search and seizure clause of the same, and the Court rules that the motion to quash the Information and the Search Warrant shall be overruled" [R. 24].

(c) Prior to the ruling of the Court on the motion to quash on August 8, 1961, appellants moved the Court for a continuance of the hearing on the merits in order to have a reasonable time to prepare their defense [R. 9-10], and thereupon the matter was continued for hearing on the merits to September 14, 1961 [R. 15].

On September 6, 1961, appellants filed a motion for jury trial [R. 10]. The appellants alleged that the standards for judging obscenity could only be applied by a jury, that "only by a jury trial of the essential issues herein presented can they be guaranteed the freedoms of speech and press through due process of law and equal protection of the law as provided by the First and Fourteenth Amendments to the Constitution of the United States and Sections 11 and 18 of the Bill of Rights of the Constitution of the State of Kansas" [R. 10].

On September 11, 1961, argument on appellants' motion for a jury trial was held, and the motion was on the said day overruled [R. 15]. Appellants renewed their motion to quash, and the said motion was also overruled [R. 15].

On September 14, 1961, the matter came on for trial [R. 15-16] before the said Honorable Albert B. Fletcher, a Judge of the District Court for Geary County, Kansas. The State offered into evidence [R. 25] as Plaintiff's Exhibits 1 through 31, the books in question [R. 5-6]. Appellants objected to the introduction of the evidence on the constitutional grounds urged in support of their motion to quash [R. 7-9; Tr. B-8-9].² The objection was overruled [R. 25]. The State rested [R. 25].

Appellants demurred to the evidence, asserting that the State had failed to prove that the books exceeded "contemporary community standards" [R. 25; Tr. B-9-10, 11-16, 21-32]. The State urged that it was not possible to produce an "average man" from the "community of Junction City" [Tr. B-17] or elsewhere, or to obtain a sufficient number of witnesses in order for the Court to determine "what a community standard in the community is" [Tr. B-17]. The State averred that "the Judge of this Court, Your Honor, if you please, is a resident of some substantial length of time in this community and is presently and was at all times pertinent to this case a resident of this community. We're speaking of the City of Junction City, or Geary County" [Tr. B-18]. The State urged that the issue of community standards "is a matter of law" [Tr. B-18]. The State contended that the Court was required to "make a legal decision; in other words, to apply to

²The reference "Tr." is to the Reporter's Transcript of proceedings in the District Court (2 volumes), certified by the Clerk of the court below, and on file in this Court. The transcript of proceedings of August 7, 8 and 11, 1961, in one volume, is referred to as "Tr.A"; the transcript of proceedings of September 11, 14, and 15, 1961, in the second volume, is referred to as "Tr.B."

these books the knowledge of the Court which it's entitled to do, of the standards of the community in which the Court lives and works, to determine in the Court's mind what is an average person in the community, because the State could never establish this by any stretch of the imagination" [Tr. B-20-21].

Appellants' demurrer to the evidence was overruled [R. 25].

The appellants called witnesses on their own behalf.³ Qualified experts testified relative to the limits of candor in the community with respect to the description and representation of sex and nudity in books and other writings. Appellants offered into evidence a number of books, some twenty-nine in number, the property of the George Smith Public Library in Junction City, Kansas, and one book (*Tropic of Cancer*) which the librarian testified she wanted to purchase but which was too expensive, and another book, a copy of which belonged to the library but was lost.⁴

³Lois York [R. 25-28], Librarian of the George Smith Public Library in Junction City, Kansas; Edward A. Howard [R. 28-30], Librarian at the Lawrence Public Library, in Lawrence, Kansas; Dr. Richard Lichtman [R. 30-32], Assistant Professor of Philosophy at the University of Kansas City; Joseph Rubinstein [R. 32-34], Assistant Professor of Bibliography and Librarian at the University of Kansas.

⁴Lawrence, *Lady Chatterley's Lover* [Def. Ex. 1, R. 26]; *Memoirs of Hecate County* [Def. Ex. 2, R. 26]; Wallace, *The Chapman Report* [Def. Ex. 4, R. 26]; O'Hara, *From the Terrace* [Def. Ex. 5, R. 26]; *Peyton Place* [Def. Ex. 6, R. 26]; O'Hara, *Ten North Frederick* [Def. Ex. 7, R. 26]; Joyce, *Ulysses* [Def. Ex. 8, R. 26]; Jones, *From Here to Eternity* [Def. Ex. 9, R. 26]; Wolfe, *The Magic of Their Singing* [Def. Ex. 10, R. 26]; O'Hara, *A Rage to Live* [Def. Ex. 11, R. 26]; Mergendahl, *The Bramble Bush* [Def. Ex. 12, R. 26]; Borth, *The Sot Weed Factor* [Def. Ex. 13, R. 26]; Anderson, *Winesberg, Ohio* [Def. Ex. 14, R. 27]; Caldwell, *God's Little Acre* [Def. Ex. 15, R. 27]; Jackson, *The Fall of Valor* [Def. Ex. 16, R. 27]; Caldwell, *Tobacco Road* [Def. Ex. 17, R. 27];

The testimony of the witnesses established that many of the books introduced into evidence by appellants, books which generally could be found in the public library and on best-seller lists, were more candid in description and representation of sex, and in the explicit use of language, than the books involved in the case. The testimony of the witnesses was that the books offered into evidence by the State contained integrated plots and characters and did not exceed limits of candor or customary freedom of expression in the description or representation of sex [R: 25-28, 28-30, 30-34].

Following the presentation of the aforesaid testimony, appellants rested [Tr. B-136]. The State offered no rebuttal [Tr. B-136].

The District Court rendered a memorandum decision [16-18] on September 19, 1961. The District Court construed the *Roth* test for obscenity as containing four essential ingredients: "average person"; "contemporary

Steinbeck, *Grapes of Wrath* [Deft. Ex. 18, R. 27]; Nabokov, *Lolita* [Deft. Ex. 19, R. 27]; Pennell, *History of Rome*; Hanks [Deft. Ex. 20, R. 27]; Voltaire, *Candide* [Deft. Ex. 21, R. 27]; Huxley, *Brave New World* [Deft. Ex. 22, R. 27]; Zola, *Nana* [Deft. Ex. 23, R. 27]; Defoe, *Roxana, the Fortunate Mistress* [Deft. Ex. 24, R. 27]; *The Satires of Juvenal* [Deft. Ex. 25, R. 27]; *The Satyricon of Petronius* [Deft. Ex. 26, R. 27]; Farrell, *The Young Manhood of Studs Lonigan* [Deft. Ex. 28, R. 27]; Mykle, *The Song of The Red Ruby* [Deft. Ex. 29, R. 27]; Miller, *Tropic of Cancer* [Deft. Ex. 38, R. 27, Tr. B-117]; Mason, *The World of Suzie Wong* [Deft. Ex. 27, R. 28]. Following the direct testimony of the witness York, counsel for appellants requested permission to withdraw the books which in all but two instances belonged to the public library, and to substitute duplicate copies as quickly as possible. There was no objection [Tr. B-53]. Together with the certified record and the Reporter's Transcripts of the proceedings, the Clerk of the court below has certified the State's Exhibits 1-31, and Defendants' Exhibits 1, 2, 4, 5, 6, 7, 9, 11, 19, 29, 38, now on file in this Court.

community standards," "dominant theme" and "prurient interests" [R. 16], the first two ingredients described by the Court to be "impossible as to ascertainment to a certainty" [R. 17].

The District Court stated that the Court would draw a line between the books in question and the comparable books introduced by appellants—that line being "the purpose for which the books were written" [R. 17]. According to the District Court, the "core" of the books in question "would seem to be that of sex, with the plot, if any, being subservient thereto"; the "core" of the books introduced into evidence by appellants "would seem to be the plot, with sex being subservient thereto and only acting as an agent to carry the plot to its intended conclusion" [R. 17].

The District Court stated that the Court had made the *Roth* test operative in the case herein in the following manner: "If the books in question showed to this Court that their dominant purpose was calculated to effectively incite sexual desires, and the Court further believed that they would have this effect on the average person residing in this community, then they are not entitled to the protection of the Amendment to the Constitution. This Court believes that the books under indictment here fall within the last statement and are not entitled to the said protection" [R. 17-18].

A motion for new trial was overruled [R. 18]. The order, judgment and decree of the District Court directing the books to be turned over to the Sheriff of Geary

County to be destroyed by said Sheriff "upon the further order of this Court" [R. 18] was entered on January 19, 1962 [R. 14]. Execution of the said order of destruction has been stayed by order of the District Court pending final determination of the appeal herein.

(d) On appeal to the Supreme Court of the State of Kansas, appellants renewed all their constitutional claims, contending that the statute, on its face, and as construed and applied, abridged freedoms of speech and press; deprived appellants of their liberty and property without due process of law; denied the equal protection of the laws; deprived appellants of their right to a jury trial; deprived appellants of their right to be secure from unreasonable search and seizure; that there was a failure of proof of the essential ingredients of the offense; that only the local standards of the community had been applied; that the books ordered destroyed were constitutionally protected;—all in violation of the First, Fourth and Fourteenth Amendments to the Constitution of the United States.

The Supreme Court of the State of Kansas affirmed the judgment of the District Court, Justices Price and Robb dissenting without opinion [R. 37-41]. The opinion of the Supreme Court sets forth the memorandum decision of Judge Fletcher, in full [R. 38-40]. The Supreme Court took note of the fact that appellants "are asserting all of the matters urged to the trial court" [R. 40].

The majority opinion recites the search and seizure procedures, utilized in the case under the state statute,

as heretofore detailed [R. 37-38]. After then setting forth the memorandum decision of the District Court, the opinion states that the test for obscenity provided in the statute (G. S. 1961 Supp. 21-1102a) is "adequate" and is being applied by the Court [R. 40].

The majority opinion states that the "vital question" is whether the seized books were in fact obscene [R. 40]; that the test for obscenity is not easy to state; that Irvin S. Cobb once defined obscenity as when "the depth of the dirt exceeds the breadth of the wit" [R. 40].

As to the argument that no evidence was adduced by the prosecution to show comparison of the seized books with other books in common circulation, the opinion of the Court merely states that the District Court pointed out the difference between the seized books and the twenty-nine books taken from the Junction City Public Library [R. 40].

The majority opinion states that the brief submitted by the Attorney General listed the 31 seized books, "the pages upon which the obscenities occur," and a "short description" [R. 40]. The opinion states: "We have checked the cited pages and find that they well bear out the descriptions" [R. 40]. The Court then immediately added that the books as a whole come within the definition "found in paragraph 4 of the syllabus in Roth v. United States" [R. 40].

The Supreme Court stated that the seized books are "hard core pornography"; "obscene by the definition

found in the Roth case", or "by the definition found in the statute", or "by any other definition" [R. 40]; and that young G. I.'s from Fort Riley—many of whom frequent Junction City—would be of the same opinion", to wit, that the books are hard core pornography [R. 41].

The Court stated that obscenity is not protected by the "First Amendment" nor is it protected by the "due process clause of the Fourteenth Amendment" [R. 41]; that there was "no right to a jury trial" [R. 41] because the action grows out of a statute, and no basis existed for a jury at common law. "Amendment VII of the federal constitution" preserves only the right of trial by jury "as it existed at common law" [R. 41], observed the Court.

The Court concluded that the seized books were without "literary merit", were "trash" [R. 41].

ARGUMENT.

Summary of Argument.

(a) The absence in the Kansas statute herein of a right to jury trial, and the refusal to grant appellants' request for a jury trial and jury determination of the issue of obscenity, renders the statute unconstitutional. This Court adopted the "contemporary community standards" test in *Roth-Alberts* as an essential ingredient of the constitutional standard for judging the obscenity of a writing, and freedom of expression cannot be safeguarded if the community through its representatives is not permitted to determine the extent of community toleration.

The confluence of English and American history bears witness to the essential inter-relationship between trial by jury and freedom of the press. Historically, the struggle for freedom of speech and press in England was linked with the issue of the right of juries to determine whether particular publications should be suppressed. Early American history, exemplified in the Zenger trial and the demands for a Bill of Rights after the adoption of the Constitution, also support the view that a jury trial for restriction on the sales of books is required by the constitutional guaranty of freedom of the press.

The genesis and evolution of the *Roth-Alberts* test for judging obscenity, and the logic of the decision, additionally demonstrate that a jury trial in obscenity proceedings is required under the Constitution. Protection for writings in *Roth-Alberts* was made dependent upon public opinion; and under such circumstances, trial by jury is an indispensable ingredient of the community standards test. A judge neither in law

nor in fact, is a representative of the community. Only a jury can appropriately determine the issue of customary freedom of expression. Nor can the issue here be determined by assimilating common law concepts to the prosecution of books in the United States, where history, tradition and a written constitution dictate a different resolution of the issue.

This issue is discussed here *arguendo* for appellants do not accept the view that any book in the United States should be at the mercy of a vote of the "common conscience" of the community derived through a jury verdict. Moreover, appellate courts, and ultimately this Court, may declare material constitutionally protected despite a jury determination.

(b) The Kansas statute, on its face and as construed, violates the free speech and press, the search and seizure, and due process provisions of the First, Fourth and Fourteenth Amendments. Suppression of books under the state statute is made dependent upon whether or not the writings arouse "sexual desires" or "sexually improper thoughts"; and search for and seizure of such books are authorized by the mere filing of an information upon information and belief, whereupon a judge is required to forthwith issue a search warrant directing seizure, with a hearing to be had not less than ten days after such seizure. There is no provision for any adversary proceeding on the issue of unlawfulness prior to seizure, and there is no limitation on the time within which a decision on the merits must be made. The statute, as construed, is broad, vague and ambiguous, creates a system of prior restraints upon expression, and authorizes search and seizure procedures completely violative of constitutional inhibitions.

Moreover, the statute as applied to the specific books herein, suffers from the same constitutional infirmities. The District Judge, employing the *Hicklin* technique, never read the seven books submitted to him as a whole prior to the issuing of the search warrant, nor did the Court have time to read the said books. Moreover, solely on the basis of the scrutiny of the said seven books, the District Judge concluded that any publication bearing the imprint of the same publisher would violate the statute: The search warrant therefore authorized a broad, exploratory search, and wholesale seizure of books bearing the publisher's imprint, although the District Court had never seen nor read most of the books seized by the police officers under the warrant. This was judicial censorship in its most virulent form.

(c) The adoption by the courts below of the geographical area of Junction City, Kansas, as the community by which to determine the claim of constitutional protection for the books herein involved, renders the statute unconstitutional. Only a national standard for judging the obscenity of writings is compatible in the ultimate sense with First Amendment requirements. The Amendment requires proof, first, that the writing goes substantially beyond the standards of the local community. A local community can, of course, permit broader freedom of expression than even the First Amendment protects. If the writing does not go beyond such local standards, then the writing is clearly entitled to protection. If, however, the writing is found to allegedly exceed local community standards, it may nevertheless not be suppressed unless it is also found that the writing exceeds the standards of the

national community. This requirement is dictated by force of the guarantees of the First Amendment subsumed into the due process provisions of the Fourteenth Amendment.

(d) The State failed to prove, and deliberately refrained from offering any evidence to prove, that the books herein exceeded contemporary community standards. This omission of proof creates a serious constitutional infirmity in the law. Moreover, without contradiction, the appellants proved by competent experts and comparable material, that the writings here do not exceed community standards. The District Court, however, ignored such comparable testimony on the basis of impermissible legal standards improvised by the Court. Thus, the books herein have been suppressed without proof that the writings exceed community standards, and by an arbitrary disregard of uncontradicted proof that the books do not exceed such standard.

(e) In the constitutional sense, the books herein are not obscene, and it was violative of the Constitution to order their suppression. The standards employed by the courts below to authorize the burning of the books herein undermining First Amendment freedoms.

Since the Court has coupled this case and the case of *Jacobellis v. Ohio* for argument, and since both cases involve problems with respect to the use of appropriate standards to assure constitutional protection for freedom of expression, counsel for appellants briefly discusses the need for re-examination of the basis of the decisions of the Court in the "obscenity" area. Upon critical examination and in the light of

the actual workings of the standards enunciated by the Court, it would appear, it is respectfully submitted, that there is need for reconsideration, and that books dealing with sex should have the same rights and be subject to the same limitations which are accredited all other expressions under the Constitution of the United States and the decisions of this Court.

I.

The Absence in the Kansas Statute Herein of a Right to Jury Trial, and the Refusal to Grant Appellants' Request for a Jury Trial and Jury Determination of the Issue of Obscenity, Renders the Statute Unconstitutional on Its Face and as Applied, in Violation of the Free Speech and Press and Due Process Provisions of the First and Fourteenth Amendments.

(a) In *Roth v. United States* (*Alberts v. California*) 354 U. S. 476, 489, this Court promulgated the following standard for judging the obscenity of writings: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests." It was stated in the opinion of Mr. Justice Brennan that the aforesaid standard was intended to replace the unconstitutionally restrictive Hicklin test, that "the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity." 354 U. S., at 489.

In *Roth-Alberts*, and in the decisions of this Court which followed *Roth-Alberts*, it was repeatedly affirmed that the standards for judging the obscenity of writings, and the application of such standards in particular cases, must safeguard the protection of freedom of

speech and press for material which is not obscene. *Roth v. United States* (*Alberts v. California*), 354 U. S. 476, 488; *Smith v. California*, 361 U. S. 147, 152, 155; *Marcus v. Search Warrant*, 367 U. S. 717, 730-731; *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 490-491; *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 65-66.

The rationale of the decisions is that the power of a State to suppress "obscenity" is limited by the First Amendment protections for freedom of speech and press. There are constitutional barriers to the practical exercise of the power of suppression. A State plainly cannot restrict the dissemination of books which are not obscene. So too, a State may not impose absolute criminal liability on a bookseller for the possession of alleged obscene material, for such exercise of the power of the State tends to inhibit freedom of expression. Nor may the search and seizure procedures employed by a State to suppress alleged obscene writings be so vagrant as to fail to assure nonobscene material full constitutional protection. A State, in short, "is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech." *Marcus v. Search Warrant*, 367 U. S. 717, 731. In *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, it was affirmed: "We risk erosion of First Amendment liberties unless we train our vigilance upon the method whereby obscenity is condemned no less than upon the standards whereby it is judged."

In *Bantam*, this Court pointed out that the Fourteenth Amendment requires that regulations of obscenity by the States conform to procedures that will ensure

against the curtailment of constitutionally protected expression, "which is often separated from obscenity only by a dim and uncertain line." 372 U. S. at 66. Insistence upon such vigorous procedural safeguards is "but a special instance of the larger principle that the freedom of expression must be ringed about with adequate bulwarks." *Id.*, at 66.

In *Speiser v. Randall*, 357 U. S. 513, while assuming without deciding that a State may deny tax exemptions to persons who engage in certain proscribed speech for which they might be fined or imprisoned, this Court nevertheless held that procedures which placed the burdens of proof and persuasion on the taxpayers denied them freedom of speech without the procedural safeguards required by the due process provisions of the Fourteenth Amendment. "When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied." 357 U. S. at 520.

Kansas has held that books may be suppressed as obscene—as allegedly going beyond "contemporary community standards"—without a jury trial or jury determination. The question here is whether a State, consistent with the requirements of due process and a free press, can dispense with such a "sensitive tool" in the fact-finding process where the indispensable freedoms of speech and press are involved. The appellants submit that the question must be answered in the negative. "A statute which does not afford the defendant, of right, a jury determination of obscenity, falls short, in

my view, of giving proper effect to the standard fashioned as the necessary safeguard demanded by the freedoms of speech and press for material which is not obscene." Mr. Justice Brennan in *Kingsley Books, Inc. v. Brown*, 354 U. S. 436, 448.⁵

(b) If the adoption by this Court of the "contemporary community standards" test as an essential ingredient of the standard for judging obscenity was intended to protect writings tolerated by the community from arbitrary governmental suppression (see, *Smith v. California*, 361 U. S. 147, 171), then, it is submitted freedom of expression is not thus safeguarded when the community through its representatives is not permitted at the very least to make the determination.⁶ "Upon this point a page of history is worth a volume of logic." Mr. Justice Holmes in *New York Trust Co. v. Eisner*, 256 U. S. 345, 349:

⁵See also, Mr. Justice Douglas' dissent in *Kingsley*, concurred in by Mr. Justice Black, finding the New York statute to transgress constitutional guarantees because, among other things, the statute substituted "punishment by contempt for punishment by jury trial," 354 U.S., at 447. In *Times Film Corporation v. City of Chicago*, 365 U. S. 43, Mr. Chief Justice Warren stated: "The inexistence of a jury to determine contemporary standards is a vital flaw," 365 U.S., at 68-69. Mr. Justice Stewart, while a Judge of the Court of Appeals, stated in *Volanski v. United States*, 246 F. 2d 842 (6th Cir., 1957) that the question of obscenity "is peculiarly one best left for *nisi prius* determination, preferably by a jury." 246 F. 2d, at 845.

⁶The argument which follows on the issue of a jury trial as a matter of constitutional right in obscenity proceedings is not intended to concede that any book in the United States should be at the mercy of a vote of the "common conscience" of the community. "One's right . . . to free speech, a free press . . . may not be submitted to vote; they depend on the outcome of no elections." *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 638. So long, however, as the circulation of books dealing with sex depends upon current community notions of what is acceptable, it is submitted that jury trial and jury determination are integral to such standard.

Historically, the struggle for freedom of speech and press in England was linked, among other things, with the issue of the right of juries to determine whether particular publications should be suppressed. Fox's Libel Act of 1792 while in terms procedural, transferring from the judge to the jury the power of saying whether any specific writing was a seditious libel, in actuality "placed the decision in the hands of twelve men whose views were more likely to be representative of general opinion than would be judges and lawyers who perforce had studied the sweeping assertions of the older law cases—which were often relics of Stuart and Star Chamber days." Taswell-Langmead, *English Constitutional History* (11th ed., 1960) 667.

The trials of Wilkes and the printers of the "North Briton"; the prosecution of Wilkes for his "Essay on Woman", found to be an "obscene and impious libel"; the trial of Junius for his celebrated letter to the King; the trial of Thomas Paine *in absentia*, with his historic defense by Erskine; the trial of John Horne for libelling the King's troops in America by calling them murderers; the trials of the Dean of St. Asaph and of Stockdale for the publication of "seditious" pamphlets—all of these cases were monstrous examples of how liberty of the press can be subverted when the jury is deprived of its power to decide. "Trial by jury was the sole security for freedom of the press; and it was found to have no place in the law of England." 2 May, *Constitutional History of England* (Holland ed., 1912) 11.

The change in the law of England at the close of the eighteenth century, as exemplified by Fox's Libel Act, was made necessary by the insistent demand of the people for the right of juries to render general verdicts

in all libel cases. "It was realized that, if the functions of the jury in a prosecution for libel were enlarged, . . . ; if, in other words, they had the right to give a general verdict upon the whole matter; there would be abundant security that the law would be so administered that it harmonized with the political ideas and the public opinion of the day." X Holdsworth, *History of English Law* (Lond., 1938) 673.

In the debates in the Commons prior to the passage of the Libel Act, it became clear that the real issue was whether the juries or the judges were the best tribunal to decide the question of libel or no libel. Stated one member of the House:

" . . . it depends solely on the opinion which is entertained of the libel by the public. . . . What passed in the Roman Senate for polite raillery, would in this House be deemed a gross affront, and be perhaps attended with bloodshed. . . . So changeable is the nature of a libel, so much does it assume the cameleon, and suit its colour to the complexion of the times! In short its libellous quality is founded entirely on popular opinions. There is no other standard by which it can be measured or ascertained. Who then, so proper as the people to determine the point?"

Quoted in X Holdsworth, *supra*, at 689.

When the Libel Act was passed, Lord Macauley praised "the inestimable law, which places the liberty of the press under the protection of juries." 2 May, *Constitutional History of England* (Holland ed., 1912) 18, fn. 3. Moreover, Thomas Erskine's fame was premised upon his courageous defense in the eighteenth century of "the liberty of the press and the rights of

juries". 2 May, *supra*, at 16. Almost one hundred years later, a noted English lawyer was to say: "Take, for instance" the freedom of the press. This, which we justly prize as one of the first of social blessings, is chiefly indebted to the jury for its vigorous existence". Forsyth, *History of Trial by Jury* (2d. ed., 1878) 364.

Early American history also sheds light on the issue here involved. "The close relations between the Zenger trial and the prosecutions under George III in England and America is shown by the quotations on reprints of the trial and the dedication of the 1784 London edition to Erskine, as well as by reference to Zenger in the discussions preceding the First Amendment." Chafee, *Freedom of Speech* (1920), 23. From the viewpoint of the liberal colonists in America in the early 1700's, "freedom of the press involved both absence of previous restraint and the right to a jury trial". I Government and Mass Communications (1947) 71. Professor Chafee was thus led to observe "... a jury trial for restrictions on the sale of books is probably required by both sound policy and the constitutional guaranty of freedom of the press." *Free Speech in the United States* (1941) 539. Support for this view comes also from a noted student of American constitutional history. "Those who framed the First Amendment placed great emphasis upon the value of a jury of citizens in checking government efforts to limit freedom of expression." Emerson, *The Doctrine of Prior Restraint* in 20 L. and Cont. Prob. 648, 657 (1955).

It should be recalled that many issues of the New York Weekly Journal published by Zenger were first "burnt by the hands of the common hangman" before Zenger was indicted for publishing "false, scandalous,

malicious and seditious" publications. *The Trial of John Peter Zenger (1734) and The Freedom of the Press*, prepared by the Works Projects Administration (1940) iii. See also 17 Howell's State Trials 675 (Lond. 1813). In his argument to the jury, Andrew Hamilton pointed out that one of the reasons for the abolition of the court of Star Chamber was that "the people of England saw clearly the danger of trusting their liberties and properties to be tried, even by the greatest men in the Kingdom, without the judgment of a jury of their equals" *id.*, at 47. Hamilton urged that "jurymen are to see with their own eyes, to hear with their own ears, and to make use of their own consciences and understandings, in judging of the lives, liberties or estates of their fellow-subjects." *id.*, at 49. And on the occasion when Mr. Hamilton was presented with the Freedom of New York after the acquittal of Zenger, the scroll presented to him by the common-council extolled "his learned and generous defense of the rights of mankind, and the liberty of mankind, and the liberty of the press" *id.*, at 58.

When, in 1789, James Madison rose to address the first House of Representatives, he urged upon the House certain proposed amendments to the Constitution which would "expressly declare the great rights of mankind secured under this Constitution". 1 Annals of Congress (1834) 432. Madison stated that the great mass of the people who opposed the Government created by the Constitution "disliked it because it did not contain effectual provisions against the encroachments on particular rights, and those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercises the

sovereign power" (*id.*, at 433). Thus, Madison proposed the following amendment, among others: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable" *id.*, at 434.

Madison pointed out that the policy of Great Britain in establishing a declaration of rights was not applicable to America. In England, a barrier had been raised against the power of the Crown, but the power of the Parliament "is left altogether indefinite" *id.*, at 436. Even Magna Charta, Madison observed, contained no provision for the "great rights, the trial by jury, freedom of the press, or liberty of conscience" *id.*, at 436. In the United States, stated Madison, the case was different. Barriers against power "in all forms and departments of Government" had been raised *id.*, at 436.

Madison affirmed "Trial by jury cannot be considered as a natural right, but a right resulting from a social compact, which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature" *id.*, at 437. He warned that "the State Governments are as liable to attack these valuable privileges as the General Government is, and therefore ought to be as cautiously guarded against" *id.*, at 441.

Thus, the confluence of English and American history bear witness to the essential inter-relationship between trial by jury and freedom of the press. The First Amendment was intended to prevent not merely the censorship of the press, but "any action of the government by means of which it might prevent such free and general discussion of public matters as seems

absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." *Grosjean v. American Press Co.*, 297 U. S. 233, 249-250.

(c) There is also, it is submitted, a more particular history which bears importantly on the issue here involved. The genesis and evolution of the *Roth-Alberts* test for judging obscenity, and the logic of this Court's decision in *Roth-Alberts*, support the view that a jury trial and jury determination of obscenity is a matter of constitutional right under the First and Fourteenth Amendments.

The early decisions in the United States adopted the *Hicklin* test devised by Justice Cockburn in 1868. Lockhart and McClure, *Literature, The Law of Obscenity and The Constitution* in 38 Minn. L. Rev. 295, 325-326 (1954). The inconsistency of the *Hicklin* rule with First Amendment principles, however, became soon apparent, and in 1913 Judge Learned Hand inquired whether the word "obscene" should not be allowed to indicate "the present critical point in the compromise between candor and shame at which the community may have arrived here and now?" *United States v. Kennerley*, 209 Fed. 119, 121 (D. C. N. Y. 1913). In Judge Hand's view, if literature were to be made subject to the "social sense of what is right", then a "jury should in each case establish the standard" (*id.*, at 121). "A jury", stated Judge Hand, "is especially the organ with which to feel the content comprised with such words at any given time, but to do so they must be free to follow the colloquial connotations which they have drawn up instinctively from life and common speech" *id.*, at 121.

In *United States v. Levine*, 83 F. 2d 156 (2d Cir., 1936), Judge Hand again stressed the requirement of a jury in obscenity actions. "Thus 'obscenity' is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premise, but really a small bit of legislation ad hoc, like the standard of care." 83 F. 2d, at 157. Again, during discussion of the Tentative Draft by the American Law Institute, Judge Hand, expressing concern about the "absolute unknown contour" of the obscenity concept, stated that "we must leave it to the jury to say, is this obscene." American Law Institute, *Proceedings*, 34th Annual Meeting, 190-191 (1957).

The drafters of the Model Penal Code issued their recommendations on obscenity shortly before the rendition of the *Roth-Alberts* decision in 1957. A. L. J. Model Penal Code, Tent. Draft No. 6 (May 6, 1957). The definition of obscenity as proposed by the Institute was as follows "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters."⁷ As to this definition of obscenity, the Institute stated:

"Under our definition of obscenity a court could not instruct that a given writing is obscene as a matter of law, since elements other than the na-

⁷That the Institute intended to make customary freedom of expression an unique and essential ingredient of the test for obscenity is emphasized by the definition of obscenity as it appears in the final proposed draft, A.L.I. Model Penal Code, Proposed Official Draft (May 14, 1962), section 251.4(1). See *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 485-486.

ture of the material itself enter into the determination, particularly the question of customary freedom of expression. Jury trial in this field has the merit of requiring unanimous condemnation by this sample of the general population on issues which seem to be peculiarly within their competence: what is the predominant appeal of the material to the ordinary adult, and what are the outer limits of custom in description or representation of sexual matters."

A. L. I. Model Penal Code, *supra*, at 47.


Whether obscenity was entitled to the same constitutional guarantees as other forms of expression was, until the decision in *Roth-Alberts*, an "open question". Lockhart and McClure, *Literature, The Law of Obscenity, and The Constitution*, 38 Minn. L. Rev. 295, 352 (1954). In *Roth-Alberts*, a majority of this Court answered the question in the negative. As against claims that obscenity is utterance within the area of protected speech and press, and that the requirements of due process are not met because of lack of precision when terms like "obscene, lewd, lascivious, filthy or indecent" are used to define the crime, a majority of this Court held that, given a proper standard for judging obscenity, constitutional safeguards for protected material were not offended.

What then is the proper standard for judging obscenity? A majority of this Court replied that sex is not obscenity; that the portrayal of sex, for example, in art, literature and scientific works is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. *Id.*, at 487. It was stated that all ideas having even the slightest

redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to “the prevailing climate of opinion”—have the full protection of the guarantees unless excludable because they encroach upon the limited area of more important interests. *Id.*, at 484. The door barring federal and state intrusion into the area of freedoms of speech and press was to “be kept tightly closed and opened only the slightest crack” (*id.*, at 488).

Affirmatively, this Court formulated a definition of obscenity allegedly no different in substance from the definition proposed by the American Law Institute. *Id.*, at 487, fn. 20. In determining the obscenity of a writing, “contemporary community standards” were to be applied. *Id.*, at 489. Without this element, “Roth’s evident purpose to tighten obscenity standards” (*Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 487) would be frustrated. Thus, the obscenity or nonobscenity of a writing was made not to depend upon legal standards applicable to all other forms of expression, but to public opinion—and under such circumstances, trial by jury, it is submitted, is as indispensable to a decision on the issue of obscenity or nonobscenity of a writing as the standard itself of “contemporary community standards”, deemed essential in *Roth-Alberts* to safeguard freedom of expression.

If “community toleration” is to remain the test, only a jury representing the community, can properly decide what the community does or does not tolerate. A jury, in accordance with “our basic concepts of a democratic society and a representative government” is required to be a “body truly representative of the community,” a “cross-section of the community” serving



only "as instruments of public justice" and not as the "organ of a special class." *Glasser v. United States*, 315 U. S. 60, 85-86.

Unless, therefore, the fact of a jury trial is subsumed within the concept of "contemporary community standards", the test for obscenity formulated in *Roth-Alberts* as a safeguard for protected speech and press becomes, it is submitted, illusory. To enact a statute which permits books to be burned because they allegedly exceed the bounds of community toleration, without allowing the community through its representatives to decide whether the books exceed the limits of such community toleration, is arbitrary and capricious and violative of the due process and free speech and press provisions of the Constitution. This at least is the verdict of history, both past and present, and, it is submitted, the "commonsensical" interpretation of this Court's ruling in *Roth-Alberts*.

A judge is not a representative of the community; he is a representative of an arm of government, the judicial arm, and the jury, as Madison made clear, was intended to act as a barrier against "all forms and departments of Government" where the people's right to know was at stake in any dispute between the Government and individual citizens. A very strong tradition is opposed to the notion that a single judge should be able to suppress any book or periodical or work of art. 1 *Government and Mass Communications* (1947) 218.

Moreover, a judge does not in fact represent a cross-section of the community; he represents, at best, only his own group. "The division of the community into groups becomes less serious if several groups are represented on the jury. In the vague field of obscenity,

a single judge must struggle hard to avoid using only the standard of his own group." 1 Government and Mass Communications (1947) 220.

Nor is a judge likely to know the extent of community toleration. "Twelve men in the street are familiar with the amount of frankness that Tom, Dick and Harry will stand, more so than a judge, who is somewhat set apart from the regular run of people by the seclusion and intense preoccupations of his work.

. . . A judge in his study surrounded by books may readily get scared about the dangers of the printed page, whereas jurors can be led to consult their own experience and see whether they ever knew anyone who was ruined merely by what he read." *Id.*, at 221.

Finally, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U. S. 11, 14. However strongly it may be urged that a judge may be relied upon to fairly determine the issue of customary freedom of expression, history demonstrates that a free people will not be content to permit an official of government to decide for them what they may speak and read. Unless there is the appearance of fairness in decision making, as well as actual fairness in decision, there can be no confidence that we are a government of laws, not of men.⁸

(d) The court below rejected appellants' claimed right to a jury trial, because, stated the court, the Bill of Rights of the state and Federal Constitutions pre-

⁸In Massachusetts, any person interested on behalf of a book may appear in a suit seeking to suppress the writing as obscene, and claim a right to trial by jury on the issue of obscenity. General Laws, ch. 272, section 28D. Wisconsin has a similar provision. Statutes, section 269.565(2). See also, 19 U. S. C. 1305 (libel proceedings after seizure by Customs; party interested may demand jury trial).

served only the right of trial by jury "as it existed at common law" [R. 41]. "This action grows out of a statute", stated the court, "and we know of no basis for it at common law. Therefore, there was no right to a jury trial" [R. 41].

It is submitted that the ruling of the court below does not meet the issue here. The *in rem* proceeding was initiated here to destroy and burn books, ordinarily protected from suppression by the provisions of the First Amendment. The framers of the Bill of Rights did not intend to adopt "common law" concepts with respect to freedom of expression; these common law principles were in many respects "rejected by our ancestors as unsuited to their civil or political conditions", *Grosjean v. American Press Co. Inc.*, 297 U. S. 233, 249. See 1 Annals of Congress (1834) 436; Madison; *Report on the Virginia Resolutions*, 4 Elliot's Debates 546, 561-567.

Since the State's power to suppress obscenity is limited by the constitutional protections for free expression, and since, it is submitted, the requirement of a jury trial is integral to the "contemporary community standards" test for judging obscenity, it does not meet the issue to assimilate common law rules, or the non-existence of common law precedent, to a prosecution of books in the United States where history, tradition and a written constitution dictate a different resolution of the issue. Compare, *Smith v. California*, 361 U. S. 147, 152-153; *Marcus v. Search Warrant*, 367 U. S. 717, 730-731.

The question is not whether the Seventh Amendment requires a jury trial in obscenity prosecutions,⁹ but

⁹See, the dissenting opinion, of Mr. Justice Black in *Adamson v. California*, 332 U. S. 46, 68-123.

whether the First Amendment, as subsumed into the due process provisions of the Fourteenth Amendment, does so require. As Madison stated: "The state of the press, therefore, under the common law cannot . . . be the standard of its freedom in the United States." *Report on the Virginia Resolutions* in 4 Elliot's Debates 546, 570.

(e) In the light of all the aforesaid, appellants submit that the absence in the statute herein of a right to jury trial renders the statute unconstitutional. Of course, as with jury questions generally, a trial judge must initially determine that there is a jury question, "i.e., that reasonable men may differ whether the material is obscene". Mr. Justice Brennan, dissenting in *Kingsley Books, Inc. v. Brown*, 354 U. S. 436, 448. But a court cannot instruct a jury that a given writing is obscene as a matter of law, "since elements other than the nature of the material itself enter into the determination, particularly the question of customary freedom of expression". A.L.I. Model Penal Code, Tent. Draft No. 6 (May 6, 1957) 47. An appellate court may for similar reasons, reverse an obscenity judgment if a trial court fails to submit a controverted issue of community standards to a jury, but it may also reverse a jury determination if, in the opinion of the appellate court, reasonable men could not differ on the question of a writing being within the customary limits of candor. See, *Commonwealth v. Moniz*, 336 Mass. 178, 143 N. E. 2d 196 (1957); 338 Mass. 442, 155 N. E. 2d 762 (1959). And since the issue involves factual matters "entangled in a constitutional claim", the appellate courts, and ultimately this Court, may declare the material constitutionally protected despite the jury determination. *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 488.

II.

The Statute, on Its Face, and as Construed and Applied, Violates the Free Speech and Press Provisions, the Search and Seizure Provisions, and the Due Process Provisions of the First, Fourth, and Fourteenth Amendments to the United States Constitution.

(a) The appellants consider, first, the validity of the statute, on its face and as construed by the state courts. "The interests here at stake are of significant magnitude, and neither their resolution nor impact is limited to, or dependent upon, the particular parties here involved. Freedom and viable governments are both, for this purpose, indivisible concepts; whatever affects the rights of the parties here, affects all." *Gibson v. Florida Legislative Investigation Committee*, 372 U. S. 539, 545-546. See also, *Smith v. California*, 361 U. S. 147, 151; *Thornhill v. Alabama*, 310 U. S. 88, 97-98.

On its face, the Kansas statute interdicts any book "containing obscene, immoral, lewd or lascivious language, or obscene, immoral, lewd or lascivious prints, pictures, figures or descriptions, manifestly tending to the corruption of the morals of persons" (G. S. 1961 Supp. 21-1102[a]).

The test to be applied in cases under the aforesaid section (a) is whether the effect of the book upon the average person in the community is to arouse "sexual desires" or "sexually improper thoughts". The book must be judged as a whole, "by the standards of common conscience of the community of the contemporary period of the violation charged". G. S. 1961 Supp. 21-1102(b).

Whenever a judge receives an information, verified "upon information and belief" by the county attorney or attorney general, stating that there is any prohibited book as set out in subsection (a) located within his county, it "shall be the duty of such judge" to "forthwith" issue his search warrant directing the seizure of such "prohibited item or items". A copy of such warrant shall be served or posted by the sheriff at the time of seizure of the material, which shall serve as notice to all interested persons of a hearing to be had "at a time not less than (10) days after such seizure". At the hearing, the judge issuing the warrant shall determine whether the material seized violates the statute. If the judge so finds, he shall order the items destroyed, provided such items shall not be destroyed so long as they may be needed in any criminal prosecution. G. S. 1961 Supp. 21-1102(c).

A standard which calls for the suppression of books deemed "immoral" or "manifestly tending to the corruption of morals of persons" fails to provide ascertainable standards and readily sweeps within its ambit constitutionally protected material. *Holmby Productions, Inc. v. Vaughn*, 350 U. S. 870, rev'g. 177 Kan. 728, 282 P. 2d 412 (1955); *Musser v. Utah*, 333 U. S. 95, and the subsequent state decision, *State v. Musser*, 118 Utah 537, 233 P. 2d 193; *Kingsley International Pictures Corp. v. Regents*, 360 U. S. 684; *Commercial Pictures Corp. v. Regents*, 346 U. S. 587, rev'g. 305 N. Y. 336, 113 N. E. 2d 502 (1953).

Moral standards are so ambivalent¹⁰ and are so constantly being modified by a host of complex influences

¹⁰See, Kinsey, *Sexual Behavior in the Human Male* (1948); *Sexual Behavior in the Human Female* (1953).

that any attempt to measure constitutional protection for books by such a vagrant standard as "immoral" can only result in the suppression of some of the finest literature of our times. The Constitution protects ideas which are contrary to "the moral standards" of its citizenry; it indeed protects "advocacy of the opinion that adultery may sometimes be proper" (*Kingsley Pictures Corp. v. Regents, supra*, at 688-689). See also, *Mounce v. United States*, 355 U. S. 180, rev'g. 247 F. 2d 148 (9th Cir., 1957). Nor, for similar reasons, is the "corruption of the morals of persons" a proper standard for safeguarding the protection of freedoms of speech and press. "... the proposition, however stated, is fraught with ambiguities and an assumption of doubtful validity". Lockhart and McClure, *Literature, The Law of Obscenity, And The Constitution*, 38 Minn. L. Rev. 295, 332.

Moreover, and this appears crucial to the issue here, the test to be applied in the use of such aforesaid standards is solely the effect of arousing "sexual desires" or "sexually improper thoughts". This Court has refused to support a standard so vague and ambiguous as to permit the suppression of material because it allegedly arouses "sexual desires." *Times Film Corp. v. City of Chicago*, 355 U. S. 35, rev'g. 244 F. 2d 432, 435 (7th Cir., 1957).

The American Law Institute stated: "We reject the prevailing test of tendency to arouse lustful thoughts or desires because it is unrealistically broad for a society that plainly tolerates a great deal of erotic interest in literature, advertising, and art, and because regulation of thought or desire, unconnected with overt misbehavior, raises the most acute constitutional as well as practical difficulties." Tent. Draft. No. 6, *supra*,

at 10. Critical commentators are uniform in declaring that the "sexual desires" or "sexually improper thoughts" test for obscenity cannot be squared with the dictates of the First Amendment. See, for example, Lockhart and McClure, *Literature, The Law of Obscenity, And The Constitution*, 38 Minn. L. Rev. 295, 329-331; Kalven, *The Metaphysics of the Law of Obscenity*, *The Supreme Court Review* (1960) 1, 40-41; *United States v. Roth*, 237 F. 2d 796, 80 *et seq.* (2d Cir., 1956), dissenting opinion of Judge Frank; *Commonwealth v. Gordon*, 66 Pa. Dist. & Co. R. 101 (1949), opinion of Judge Curtis Bok. And it is entirely arbitrary and capricious to infer that a sexual desire has a corruptive effect upon the average person.

Since "standards of permissible statutory vagueness are strict in the area of free expression" (*N.A.A.C.P. v. Button*, 371 U. S. 415, 432), the statute here which is susceptible of sweeping and improper application should not be permitted to stand, it is respectfully submitted.

Nor was the construction of the statute by the courts below restrictive of the statutory language. The District Court declared that the rule of the *Roth* case, and the test set forth in the statute, would be made "operative in this case in the following manner: If the books in question showed this Court that their dominant purpose was calculated to effectively incite sexual desires, and the Court further believed that they would have this effect on the average person residing in this community, then they are not entitled to the protection of the Amendment to the Constitution" [R. 39-40].

The opinion of the court below recites the District Court's decision with manifest approval [R. 38-40].

The Court then states that the "test for obscenity is not easy to state" [R. 40]; that Irvin Cobb once defined obscenity as when "the depth of the dirt exceeds the breadth of the wit" [R. 40]; that the books herein were rightfully suppressed "by the definition found in the Roth case, or by the definition found in the statute or by any other definitions" [R. 41].

Thus, the Court seemingly embraces all conceivable tests like talismanic labels. Compare, *Stromberg v. California*, 283 U. S. 359, 368. This much is clear from the Court's opinion: it recognizes that the *Roth* test is different from the test in the state statute. It was conceded that the state statutory test had been taken only "from an instruction" allegedly approved in *Roth*. See, 354 U. S., at 490. Thus, the statute, as construed, eliminates any "prurient interest" or "corrupt and deprave" test and substitutes solely the interdiction of books which arouse "sexual desires" or "sexually improper thoughts."

It is in this context, moreover, that the statute provides for the search and seizure of books and other publications as well as pictures, motion pictures and other representations. Here the proceedings under the statute may be initiated solely by an information verified "upon information and belief". Compare, *Rice v. Ames*, 180 U. S. 371, 374. No copies of the publications alleged to be "immoral" or manifestly tending to the "corruption of the morals" by arousing "sexual desires" and "sexually improper thoughts" are required to be submitted to the judicial officer before issuance of the warrant of seizure.

There is no provision for any adversary proceeding on the issue of unlawfulness of the material prior to

seizure. The statute effectively cuts off the circulation of the material and the public's access to the writings without any prior determination that the material is not entitled to constitutional protection. The judicial officer is under a mandatory duty to issue the warrant, forthwith, and a hearing can be held "not less than" ten days after seizure. There is no limitation on the time within which a decision must be made. The statute, by the breadth of its terms and the vagueness of its language, authorizes the issuance of general warrants against writings, and permits the arbitrary search for and seizure of all media of communication.

The statute, on its face and as construed, thus bristles with constitutional infirmities. Initially, the statute is so broad and so vague and ambiguous in its terminology that it suffers from the double vice of being "capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression" (*Smith v. California*, 361 U. S. 147, 151), and of failing to provide ascertainable standards so that men of common intelligence can determine what is or is not permissible (*N.A.A.C.P. v. Button*, 371 U. S. 415, 432-434). The statute broadly vests in public officials an unrestricted discretion to censor and suppress books. See, *Lovell v. Griffin*, 303 U. S. 444; *Thornhill v. Alabama*, 310 U. S. 88.

In addition, the statute creates a system of prior restraints of expression, limitless in scope. Such a system "comes to this Court bearing a heavy presumption against its constitutional validity. *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 70. None of the "closely defined procedural safeguards" found in the New York statute approved in *Kingsley Books, Inc. v.*

Brown, 354 U. S. 436, 437 appear in this Kansas statute.

Moreover, the statutory procedures here are permeated with even more constitutional infirmities than in *Marcus v. Search Warrant*, 367 U. S. 717. The Missouri statute, and implementing rules of court (367 U. S., at 719-720, fn. 2, 3, 4), require the complaint to be verified by oath or affirmation and to state the "facts positively and not upon information or belief". The judicial officer must be satisfied that there is "reasonable ground" for the complaint, and the warrant need not issue until the judge or magistrate is satisfied from the "evidential facts" of the "existence of probable cause".

Here under the Kansas statute the information may be verified "upon information and belief", and without more, the judicial officer is under a duty to issue the warrant of seizure. There is no step in the Kansas procedure before seizure "designed to focus searchingly on the question of obscenity". *Marcus v. Search Warrant*, *supra*, at 732.

Indeed, the statute permits the filing of an information so sparse that no warrant could properly issue thereon consistent with the requirement of the Fourth and Fourteenth Amendments. Compare, *Wong Sun v. United States*, 371 U. S. 471, 481-482. The statute permits the issuance of wholesale or dragnet search warrants against writings which both the First and Fourth Amendments, subsumed into the due process provision of the Fourteenth Amendment, forbid. *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58; *Near v. Minnesota*, 238 U. S. 697; *Mapp v. Ohio*, 367 U. S. 643.

(b) The statute, as applied to the books herein involved, also violates the constitutional provisions aforesaid. It should be noted that only seven books were presented to the District Judge. The prosecutor, by notations, guided the Judge to the reading of excerpts in the books. Thus, the *Hicklin* method of judging the obscenity of writings was employed, despite the rejection of such method by this Court in *Alberts* "as unconstitutionally restrictive of the freedoms of speech and press". 354 U. S. 476, 489.

The District Judge refrained from stating that he had read the books in their entirety; he had only "scrutinized" them. The record shows that only about $\frac{3}{4}$ of an hour was consumed in such "scrutiny". Thus, as to the seven books, there was no attempt made, nor was there time, to determine the "dominant theme" of each of the books, "taken as a whole". See, *People v. Bantam Books* (*People v. Carr*), 9 Misc. 2d 1064, 172 N. Y. S. 2d 515 (1958).

The determination to issue the warrant was based upon the said scrutiny of the seven books, upon which basis the District Judge concluded that "any" publication bearing the imprint "This is an original Night Stand Book" would violate the statute. The warrant therefore authorized a broad, exploratory search, and wholesale seizure of books bearing the publisher's imprint aforesaid.

Pursuant to such warrant, the executing officer did in fact seize and remove 1,715 books, of which there was 31 different and specific titles. The warrant of seizure, issued on July 25, 1961 and executed on July 26, 1961, gave notice of a hearing to be held on August 7, 1961.

The motion to quash was filed on the said day, and decision denying the motion was rendered on August 11, 1961. While it is true that appellants were compelled to seek a continuance of the hearing thereafter on the merits in order to properly prepare their defenses against such wholesale seizure, it appears clear, it is submitted, that there was in this case a "thoroughgoing and drastic restraint" on the circulation of books. *Marcus v. Search Warrants of Property*, 367 U. S. 717. See also, *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 518-519; *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58. Moreover, no jury determination was ever made that the books exceeded community standards, and the writings are still suppressed.

The statute, as thus construed, and as applied to the particular factual situation under consideration, constitutes an effective prior restraint on First Amendment freedoms. Here, Kansas has empowered its courts to suppress the dissemination of unexamined books issued by a publisher solely because other books issued by the publisher had been deemed offensive. "This is of the essence of censorship." *Near v. Minnesota*, 283 U. S. 697, 713; *Kingsley Books, Inc. v. Brown*, 354 U. S. 436, 445. See also, *Grosjean v. American Press Co.*, 297 U. S. 233. To seize books under circumstances such as these, and suppress their circulation, is to create a judicial "instrument for stifling liberty of expression" (*Marcus v. Search Warrant, supra*, at 729) which the Bill of Rights was intended to outlaw.

III.

The Adoption by the Courts Below of the Geographical Area of Junction City, Kansas, as the Community by Which to Determine the Claims of Constitutional Protection for the Books Herein Involved Renders the Statute, as Thus Construed, Unconstitutional in Violation of the Free Speech and Due Process Provisions of the First and Fourteenth Amendments.

The First Amendment does not permit, it is submitted, the suppression of books merely because they may be deemed offensive by a local community. "The Constitution is not geared to patchwork geography. It tolerates no independent enclaves." *Christian v. Jemison*, 303 F. 2d 52, 55 (5th Cir., 1962).

The standards for judging obscenity formulated by this Court were clearly intended, it is submitted, to restrict the opportunities for suppression of writings in the United States. The Court has constantly held that the protections of the First Amendment are equally provided with the same force and effect in the Fourteenth Amendment. *Marsh v. Alabama*, 326 U. S. 501, 511; *Kingsley International Pictures Corp. v. Regents*, 360 U. S. 684. "rights protected against state invasion by the Due Process Clause of the Fourteenth Amendment are not watered down versions of what the Bill of Rights guarantees." *Gideon v. Wainwright*, 372 U. S. 335, 346. If these protections are to be safeguarded, it would appear essential that there be a national standard for the judging of obscenity. If the Nation as a whole tolerates a writing, thus affording the writing First Amendment protection, it cannot be the right of a local community, it is submitted, to burn

the book as "obscene". The power of a local community to deal with "obscenity" is not curtailed in legal concept by a constitutional requirement that the trier of the facts measure the protection to which the book is entitled by the standards of the national community. The police power of a State or any local subdivision thereof is always limited, in any area, by the free speech and press, due process, and equal protection provisions of the Fourteenth Amendment. *Talley v. California*, 362 U. S. 60; *Chambers v. Florida*, 309 U. S. 227; *Baker v. Carr*, 369 U. S. 186.

Professors Lockhart and McClure have expressed the view that only a national standard for judging the obscenity of a writing is compatible with First Amendment requirements; that the "standards of particular state and local communities are not constitutionally applicable". (*Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 1, 112 [1960]). This view is predicated upon the premises, in summary, that adoption of local standards leads to the "balkanization" of freedom of expression in the country, permitting hundreds and thousands of local subdivisions to engraft their different standards upon books and art and other media of communication; that such a "crazy quilt" construction deprives an obscenity statute of any meaningful criteria of guilt; that the inevitable tendency of such vague and ambiguous law is to diminish the circulation of the press and to reduce the reading of books of general circulation dealing with sex to the level of reading of the most censorious local community; that such narrow construction results in the citizens of one part of the country enjoying the right to read literature denied capriciously

to citizens of another part of the country; and that the use of "local standards" subverts the function of appellate courts, required to apply First Amendment standards, by intruding conflicting standards imposed by a local community. 45 Minn. L. Rev., at 108-114.

Could a local jury applying "local standards" find a bookseller guilty of selling a book which this Court had held to be constitutionally protected under the First Amendment? The answer, it is submitted, must be clearly in the negative. It is no interference with the State's power to enforce obscenity laws to hold that the trier of the facts must apply national standards. What is inherently involved in any obscenity prosecution is whether the writing is entitled to First Amendment protection. First Amendment protection means the protection which the Constitution of the "United States" provides; the protection is national in scope. Moreover, it is protection for freedom of the mind and spirit; not the sale of pots and pans to the local householder. Cf., *Smith v. California*, 361 U. S. 147, 152-153.

A local jury which authorizes the suppression of a book that the people of the country would not authorize "invades the sphere of the intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control". *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 642. The reason why no State can compel a flag salute today is because the national standard of freedom of expression embodied in the First Amendment forbids it. The standard for destroying a book should be no less. See, *Talley v. California*, 362 U. S. 60, 64-65.

There is, of course, a two-fold requirement of proof with respect to "community standards" in obscenity prosecutions, if First Amendment guarantees are to be assured. First, the proof should show that the writing goes beyond the standards of the local community. Clearly, if the writing does not, that is the end of the matter. And of course, a local community may always permit a broader area of freedom of expression than even the First Amendment assumedly protects. See, *State v. Nelson*, 168 Neb. 394, 95 N. W. 2d 679 (1959). Secondly, the proof should show that the writing exceeds the contemporary standards of the country generally. Without such additional proof, the constitutional protection for writings which are not obscene is abridged.

There is precedent on this issue. In the naturalization field, where questions of free speech and press were not even involved, the courts accepted the view that "in order to determine whether a petitioner has met his burden of establishing that he is a person of good moral character . . . we should see if the petitioner's character coincides with the generally accepted mores or standards of the average citizen of the community in which the petitioner resides. . . . If the petitioner's conduct fails to satisfy the community test, then we should see whether the 'common conscience', when it is possible of being ascertained, of the community as a whole also looks unfavorably upon such conduct." *In re Mayalls Naturalization*, 154 F. Supp. 556, 560 (E. D. Pa., 1957), opinion by Chief Judge Ganey. See also, *In re Naturalization of Spak*, 164 F. Supp. 257, 259-260 (E. D. Pa., 1958).

Such a two-fold requirement safeguards personal and societal interests protected by the Bill of Rights. A lesser requirement creates "intolerable consequences" and encounters, it is submitted, "constitutional barriers." *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 487, 488.

IV.

The Statute, as Construed and Applied, Permits the Suppression of Books Without Any Requirement of Proof by the State That the Writings Exceed Contemporary Community Standards, and Despite Uncontradicted Evidence Offered by Appellants, Arbitrarily Disregarded by the Courts Below, That the Said Books Do Not Go Beyond the Limits of Candor in Description or Representation of Sex, All in Violation of the Free Speech and Due Process Provisions of the First and Fourteenth Amendments.

(a) Not only did the State fail to offer any proof that the books herein involved go substantially beyond the limits of candor in description or representation of sex, but the record makes abundantly clear that such proof was purposefully omitted as not constitutionally required. According to the State, in order to prove "community standards", it would be necessary to produce an indefinite number of witnesses from which to distill the viewpoint of the "average man" in Junction City [Tr. B-17]. This, the State averred, is an impossibility. But, affirmed the State, the *District Judge*, a resident of the community, could determine in his own mind "what is an average person in the community, because the State could never establish this by any stretch of the imagination" [Tr. B-20-21]. All of this was proper, asserted the State, because the

issue of community standards "is a matter of law [Tr. B-18].

As heretofore demonstrated, the issue of contemporary community standards involves factual matters entangled in a constitutional claim. A single Judge is not the "average man" in a community, nor does he represent "community standards", nor, it is submitted, can a State constitutionally create a single Judge as the embodiment of community standards. Such exercise of State power is both arbitrary and capricious. See Chafee, *Government and Mass Communications*, Vol. 1 (1947), 218-221.

The argument of the State here that proof is impossible to adduce on the issue of community standards is without substance, first, because it is based on the erroneous view that community standards is solely a question of law, and second, because there are means available to prove community standards without gathering all the "average" men in the community as witnesses. See, *Smith v. California*, 361 U. S. 147, 164-167, 171-172; *In re Harris*, 56 Cal. 2d 879, 366 P. 2d 305, 16 Cal. Rptr. 889 (1961).

This omission of proof creates a serious constitutional infirmity in the law because evidence that a writing goes beyond customary limits of candor is an essential element of the test for obscenity; because the ingredient of "community standards" was made a part of the test "to tighten obscenity standards"; and because without such evidence, liberty and property, as in the case herein, can be lost without due process of law, and freedoms of speech and press abridged. *Manual Enterprises, Inc. v. Day*, 370 U. S. 478 482-488; *Thompson v. City of Louisville*, 362 U. S. 199;

Schwartz v. Board of Bar Examiners, 353 U. S. 232;
Garner v. Louisiana, 368 U. S. 157.

(b) While the State made no attempt to prove that the books herein go beyond contemporary community standards, the appellants, without rebuttal on the part of the State [Tr. B-136], proved that the books do not exceed the community limits of candor in description or representation of sex. This was done through expert testimony, and by the introduction into evidence of comparable books openly appearing in the public libraries, and sold and purchased in the community, and receiving wide general acceptance. If it is a denial of due process of law to make a finding of statutory violation without evidentiary support, it would appear to compound the constitutional infirmity to make a finding of "obscenity" when the only uncontradicted evidence in the record shows that the statute is not violated. See, *Garner v. Louisiana*, 368 U. S. 157.

Moreover, the evidence of wide acceptance of comparable material offered by appellants was arbitrarily disregarded by the District Court, upheld by the court below, upon invalid grounds. The District Court held [R. 11-12] that the difference between the books in question and the comparable material offered into evidence by appellants was their "purpose", to wit, that "sex" was "subservient" to the plot in the comparable writings, while in the books in question, the plot was subservient to sex.

Clearly, if the books in question did not go beyond the customary freedom of expression found in other writings tolerated in the community, then the books in question could not be held to exceed contemporary community standards. Whether sex was subservient to

the plot of a book, or a plot subservient to sex, was not the issue. "The community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates." *Smith v. California*, 361 U. S., at 171.

The result of the action of the courts below is this: first, there is no finding in the record that the books herein exceed community standards (nor any evidence to support such a finding); and second, the appellants were essentially deprived of the right to present relevant evidence in defense of the books. In both respects, the due process provisions of the Fourteenth Amendment were violated. *Thompson v. City of Louisville*, 362 U. S. 199; *Smith v. California*, 361 U. S. 147, 164-166, 171-172; *In re Harris*, 56 Cal. 2d 836, 366 P. 2d 305, 16 Cal. Rptr. 889 (1961). The books herein face destruction solely because of a ruling that the books allegedly incite "sexual desires". See, *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 486.

V.

The Statute, as Construed and Applied to Permit the Destruction of the Books Herein as Obscene, Violates the Free Speech and Due Process Provisions of the First and Fourteenth Amendments.

(a) In the constitutional sense, the books here in issue cannot be held to go substantially beyond limits of candor in description and representation of sex and nudity. They clearly do not go beyond customary limits of expression in language or theme—indeed, they are far more muted than many of the "best-sellers" in the literary world and in other media of communication, such as the motion pictures, television and the arts.

Neither in language nor in theme do the books herein approach the candor of discussion, the explicitness of language, that is found in writings of noted authors generally accepted and widely read by the public.

The aforesaid is demonstrated, it is submitted, by comparing the books herein with such works as Lawrence, *Lady Chatterley's Lover* [Deft. Ex. 1, R. 26], where the descriptions of sexual activity are candid and the language used, explicit; Wilson, *Memoirs of Hecate County* [Deft. Ex. 2, R. 26], the stories of residents of a suburban community with detailed descriptions of sexual intercourse; Wallace, *The Chapman Report* [Deft. Ex. 4, R. 26], detailed description and representation of sexual activities; O'Hara, *From the Terrace* [Deft. Ex. 5, R. 26], explicit sexual scenes and language throughout the story; Metalious, *Peyton Place* [Deft. Ex. 6, R. 26], replete with realistic language and incidents involving rape, incest, sexual deviations, nymphomania and other sexual aberrations; O'Hara, *Ten North Frederick* [Deft. Ex. 7, R. 26], depicting in detail the sexual activities, martial and extra-marital, of a middle-aged Pennsylvania lawyer; Jones, *From Here to Eternity* [Deft. Ex. 9, R. 26], a realistic story of army life in Hawaii; Mergerdahl, *The Bramble Bush* [Deft. Ex. 11, R. 26], a detailed account of murder, adultery and seduction in a small New England town; Nabakov, *Lolita* [Deft. Ex. 19, R. 27], the tale of a continuous seduction of or by a twelve-year old girl by or with a middle-aged lover; Mykle, *Song of the Red Ruby* [Deft. Ex. 29, R. 27], graphic and explicit sexual descriptions throughout the writing. These books, and many others, it should be recalled, were all in the public library of Junction City. [R. 25-28].

Measured by the standards of customary freedom of expression in the country today, the books herein are clearly not obscene, it is submitted. Each of the books involved contains a plot or theme [R. 29, 31, 32]. Many of them point on obvious moral [R. 29, 31]. None of the four-letter words used in the vernacular in so many best-sellers today, and owned by the library in Junction City, appear in the books here sought to be suppressed [R. 29]. The descriptions of sexual behavior in these books do not go beyond the candor of description of sexual activities found in the best-sellers contained in the Junction City library [R. 32], which are widely read, accepted and tolerated by the community generally [R. 28, 29, 30, 33]. "Today any part of life is considered fit for literary composition and publication" [R. 33].

The Constitution protects expression without regard "to the truth, popularity, or social utility of the ideas and beliefs which are offered." *N.A.A.C.P. v. Button*, 371 U. S. 415, 445. Unless integrated with unlawful conduct, all ideas—"unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion"—have the full protection of the guarantees of the First Amendment. *Alberts v. California*, 354 U. S. 476, 484.

Thus, this Court has held that it would be a complete repudiation of the philosophy of the Bill of Rights for a State to suppress "the dissemination of views because they are unpopular, annoying or distasteful". *Murdock v. Pennsylvania*, 319 U. S. 105, 116. The Court has stated: "The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous en-

lightenment was ever to triumph over slothful ignorance." *Martin v. Struthers*, 319 U. S. 141, 143. The essential characteristic of liberties of speech and press is "that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed." *Cantwell v. Connecticut*, 310 U. S. 296, 310. The "very basis of a free society" is the right of expression "beyond the conventions of the day." Mr. Justice Frankfurter, concurring in *Hannegan v. Esquire*, 327 U. S. 146, 160. .

The First Amendment protects literature and the arts because they serve as vehicles for the exposition of ideas, because they "lead the way toward sensitive and informed appreciation and response to the values out of which the riches of the general welfare are created". Meikeljohn. *The First Amendment Is an Absolute*, Supreme Court Review, 245, 257, 262-263 (1961). . See, *Alberts v. California*, 354 U. S. 476, 484, 487-488; Lockhart and McClure, *Literature, The Law of Obscenity, and the Constitution*, 38 Minn. L. Rev. 295, 368-373 (1954). See also, 5 Social Meaning of Legal Concepts, 34, 36 (1953); Trilling, *The Meaning of a Literary Idea, Aesthetics Today*, 213 (Philipson ed. 1961); Wilson, *Axel's Castle*, 2 (1931).

Freedom of expression in art and literature under the First Amendment assumes that each adult in a democratic society will be permitted to find "his own proper diet." Barzun, *The Arts, The Snobs and the Democrat*, *Aesthetics Today*, 19 (Philipson ed. 1961). Books contain ideas which challenge and stimulate people to think, and each person must be free to read any portrayal of or insight into the human condition. "From the multitude of competing offerings the public

will pick and choose". *Hannegan v. Esquire*, 327 U. S. 146, 158.

The societal interest in freedom of expression is that men will be free to develop their faculties; that men will be freed from "irrational fears". Mr. Justice Brandies in *Whitney v. California*, 274 U. S. 357, 376. "To put the issue as simply as possible: we maintain freedom not in order to indulge error but in order to discover truth, and we know no other way of discovering truth." Commager, *Free Enterprise In Ideas*, The First Freedom, 233 (Am. Library Ass'n, Downs ed. 1960).

This Court has stated that the basic guarantee of the First Amendment "is not confined to the expression of ideas that are conventional or shared by a majority". *Kingsley International Pictures Corp. v. Regents*, 360 U. S. 684, 689. "Men are entitled to speak as they please on matters vital to them; . . . Under our system of government, counter-argument and education are the weapons available to expose these matters, not abridgment of the rights of free speech and assembly." *Wood v. Georgia*, 370 U. S. 375, 389. "We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes." *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 641-642. History has amply proved the virtue of "minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our so-

ciety". *Sweezy v. New Hampshire*, 354 U. S. 234, 251. See also, Milton, *Areopagitica* 389-391, 397-399 (Great Books ed.); Madison, *Report on the Virginia Resolutions* in Elliott's Debates 569-571 (1907 ed.); Jefferson, *A Bill for Establishing Religious Freedom*, II Works of Thomas Jefferson, 438-441 (Fed. ed.); Chafee, *Free Speech in the United States* 33 (1941); Commager, *Freedom Loyalty Dissent* 14-15 (1954).

The court below described the books as "trash" and without "literary merit" [R. 41]. Neither of these appellations, it is submitted, are appropriate standards for denying constitutional protection to the writings. Sex is not obscenity (*Alberts v. California*, 354 U. S. 476) and the label of "hard core pornography" cannot be attached to writings which society generally tolerates. *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 489-490. " . . . a State cannot foreclose the exercise of constitutional rights by mere labels." *N.A.A.C.P. v. Button*, 371 U. S. 415, 429.

This Court has repeatedly warned that the content of writings which may be suppressed is extremely limited, not to be measured by subjective reactions to disagreeable themes or candid expression. To summarize: The guarantees of the First and Fourteenth Amendments apply equally to material designed to entertain or amuse as to scientific or educational writings. *Winters v. New York*, 337 U. S. 507. A writing is not to be deemed obscene because "it does not conform to some norm prescribed by an official", or because not in "good taste," or because it is not "good literature", or because it does not have "educational value", or because it is not "refined", or because it has no "enduring values", or because it is allegedly "trash". *Hanne-*

gan v. Esquire, 327 U. S. 146. A communication is entitled to constitutional protection even if public officials deem it "sacrilegious". *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495; or "prejudicial to the best interests of the people". *Gelling v. Texas*, 343 U. S. 960; or "immoral", "harmful", "non-educational" and "non-amusing". *Superior Films, Inc. v. Dept. of Education (Commercial Pictures Corp. v. Regents)*, 346 U. S. 587; or "obscene, indecent and immoral", *Holmby Productions, Inc. v. Vaughn*, 350 U. S. 870; or offensive to a "sense of propriety, morality and decency". *Mounce v. United States*, 355 U. S. 180; or because it "attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry". *Kingsley International Pictures Corp. v. Regents*, 360 U. S. 684; or because it arouses "sexual desires". *Times Film Corp. v. City of Chicago*, 355 U. S. 35; or because it advocates and depicts nudism and nudity. *Sunshine Book Co. v. Summerfield*, 355 U. S. 372; or allegedly promotes "lesbianism" and "homosexuality". *One, Inc. v. Olsen*, 355 U. S. 371.

The standards employed by the courts below to authorize the burning of the books herein does not leave much "breathing space" for First Amendment freedoms to survive, it is submitted. *N.A.A.C.P. v. Button*, 371 U. S. 415, 433. Such standards permit subjective prejudices of fact finders and decision makers to intrude into the protected areas, and such standards encourage the baneful activities of self-interested and private censorial groups in local communities. Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev.

5, 6-9 (1960); *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58; *Times Films Corp. v. City of Chicago*, 365 U. S. 43, 69-73; *Edwards v. South Carolina*, 372 U. S. 229, 237-238. " . . . constitutional rights may not be denied simply because of hostility to their assertion or exercise." *Watson v. City of Memphis, Tenn.*, 373 U. S. 526, 535-536.

(b) Since the Court has ordered that the case of *Jacobellis v. Ohio*, argued last term (No. 164), be restored for reargument, this term together with the case herein, and since both cases involve problems with respect to the use of appropriate standards to assure constitutional protection for freedom of expression, counsel for appellants, with due deference, believe that this Court will welcome some brief discussion on the need for re-examination of the "developing constitutional standards" (Lockhart and McClure, 45 Minn. L. Rev. 5 [1960]) as enunciated in *Roth* and in the subsequent decisions. "In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to re-examine the basis of its constitutional decisions." *Smith v. Allwright*, 321 U. S. 649, 665.

The basic assumptions in *Alberts* upon which the majority opinion rested were that freedom of expression under the First Amendment is not absolute; that there appeared to be a universal judgment as expressed in international agreements and the laws of Congress and the States that "obscenity" should be restrained; that obscenity is "utterly without redeeming social importance"; and that "obscene" material is therefore not within the area of constitutionally protected speech or press.

It is respectfully submitted that the aforesaid assumptions require critical re-examination. Their statement in *Alberts* perhaps served as an introduction to the real problems, but they have been unfortunately treated by the lower courts, the censors and extra-legal censors, as determinative of all First Amendment issues.

It is unnecessary, it is submitted, to canvas the merits of the "absolute" and "balancing" arguments. See *Barenblatt v. United States*, 360 U. S. 109; Frantz, *The First Amendment in the Balance*, 71 Yale L. J. 1424 (1962). It may be conceded for purposes of argument that freedom of expression is not absolute, as for example when speech is integrated with unlawful conduct. But the problem is of drawing the line between the exercise of freedom and the limitations thereon. How shall the line be drawn? It is submitted that such question is not answered, as many courts and "citizens committees" appear to believe, by advancing the assertion that freedom is not "absolute".¹¹

The other initial assumptions in *Alberts* suffer, it is submitted, from a specific difficulty—they assume common agreement on a definition of "obscenity" when as a matter of fact there is none. As Lockhart and McClure point out, there never has been an international agreement on the definition of obscenity. *Literature, The Law of Obscenity, and the Constitution*, 38 Minn. L. Rev. 295, 323 (1954). A "universal

¹¹That liberty is not absolute is one of those truisms that is always brought out and put to work whenever somebody wants to censor a book or a film that he doesn't like, or to throw a teacher or a librarian or a radio performer out of his job." Commager, *Free Enterprise in Ideas*, *The First Amendment* 231 (Am. Library Ass'n. 1960).

judgment" that expression should be restrained without agreement as to what the area of expression, so to be limited, is, can hardly be deemed a weighty reason for restrictions on freedom of expression in the United States. This appears especially true when it is considered that many countries are concerned with "obscenity" only as it connotes attacks on state religions. Moreover, the history of federal and state legislation shows that these laws derive either from the comstockery of the nineteenth century or from laws principally concerned with blasphemy or other "impious libels". See Judge Frank's opinion in *United States v. Roth*, 237 F. 2d 796, 806-810; Kalven, *The Metaphysics of the Law of Obscenity*, Supreme Court Review 9 (1960). To place reliance upon the views of foreign countries, many without written constitutions, and upon laws in this country based on premises no longer acceptable under the Constitution and the First Amendment, as interpreted by this Court, appears, it is submitted, unsubstantial.

The notion that an utterance deemed "utterly without social importance" is *ipso facto* deprived of constitutional protection, deserves the most critical examination because of the serious First Amendment implications involved. There does not appear to be any area of protected speech except discussion of sex which is chained with such an ambiguous concept. "To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these

literatures are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." *Cantwell v. Connecticut*, 310 U. S. 296, 310. "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too illusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." *Winters v. New York*, 333 U. S. 507, 510. An utterance calling for equality of treatment without regard to race may appear utterly without social importance to a southern community, but its protection under the First Amendment cannot be doubted. *Edwards v. South Carolina*, 372 U. S. 229.

It cannot be the rule, it is submitted, that a book in the United States can be suppressed if the "average person" in the community believes it to be without social value. "The application of such standards would reduce art and literature to levels acceptable to the masses and deprive particular primary audiences of material that, is of social importance to them." Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, at 114. The man who suggested that if all mankind "minus one" were of one opinion, mankind would have no right to silence that opinion, also stated:

"Popular opinions, on subjects not palpable to sense, are often true, but seldom or never the

whole truth. They are a part of the truth; sometimes a greater, sometimes a smaller part, but exaggerated, distorted, and disjointed from the truths by which they ought to be accompanied and limited. Heretical opinions, on the other hand, are generally some of these suppressed and neglected truths, bursting the bonds which kept them down, and either seeking reconciliation with the truth contained in the common opinion, or fronting it as enemies, and setting themselves up, with similar exclusiveness, as the whole truth.

Such being the partial character of prevailing opinions, even when resting on a true foundation, every opinion which embodies somewhat of the portion of truth which the common opinion omits, *ought to be considered precious*, with whatever amount of error and confusion that truth may be blended."

John Stuart Mill, *On Liberty* 31 (McCallum ed. 1946) (emphasis supplied).

The standards for judging obscenity which the Court has enunciated do not appear to safeguard the freedoms of speech and press protected from all governmental infringement under the Constitution.¹² One ingredient, to wit, that the dominant theme of the material taken as a whole "appeals to prurient interest" has been the source of considerable confusion and the basis for unjustified invasions of freedom of expression. The difficulty lies principally in the meaning of

¹²Our discussion here is concerned with the right of the average, normal adult to read a book dealing with sex. We believe a different category of constitutional problems are presented when a narrowly drawn statute specifically limited to the distribution of writings to children is involved.

the words "prurient interest". Very few persons, including psychologists, appear to know what these words mean. In *Alberts*, this Court noted that pruriency has been defined as "quality of being prurient; lascivious desire or thought." The American Law Institute has defined "prurient interest" as a "shameful or morbid interest in nudity, sex or excretion."

None of these definitions have proved to be workable. See, *State v. Nelson*, 1680 Neb. 394, 95 N. W. 2d 678 (1959); *State v. Jackson*, 224 Ore. 337, 365-379, 356 P. 2d 495, 508-515 (dissenting opinion by Justice O'Connell). They are tautological, subjective and imprecise. They serve only to feed the prejudice of the trier of the facts and enable courts and juries to suppress writings on no other basis than the talismanic labels. If anything can be distilled from the aforesaid terms, it is that writings which cause sexual desires or sexual thoughts may be suppressed. If this be the intendment of the "prurient interest" standard, then at least two difficulties are presented: the first, that in no other area of speech and press has it ever been accepted by this Court that utterances may be interdicted because they arouse thoughts and desires; second, if books are to be suppressed because they may arouse a sexual desire or a sexual thought, it is much to be feared that a great many libraries will be deprived of most of their contents, including the recent library assembled for the White House by a distinguished group of scholars. See, *N. Y. Times*, August 16, 1963, p. 1, col. 5.

Mr. Justice Harlan, in *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, suggested that the unseemliness of utterances could not be deemed obscene unless, in addi-

tion, the utterances were shown to have a "likely corruptive effect." (*Id.*, at 484-487). While such view may appear at first glance to tighten the definition, it must be stated with deference that the "corruptive effect" concept is also far from a satisfactory solution of the constitutional problem. Aside from the complex question involved in determining whether an average normal adult with his or her particular background can ever be "corrupted" solely by the reading of a book to the point of becoming changed in character and outlook, there remains the problem of whether or not writings can be suppressed under the First Amendment solely because some judge or jury may believe that a reading of the work will eventually cause the average normal adult to begin to change from Dr. Jekyll to Mr. Hyde.

With respect to the ingredient, "contemporary community standards", and "the common conscience of the community", we find here again the difficulty of determining what national standards are or what is meant by "common conscience of the community", and also the constitutional objection that the writing of a dissenting voice should not be suppressed because the community does not like it. Mr. Justice Jackson stated in *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 638: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." Mr. Justice Jackson also stated: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be ortho-

dox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." (*Id.*; at 642).

It also appears plain today that the standards for the protection of freedom of expression under the First and Fourteenth Amendments will not be safeguarded by resort to the "hard core pornography" test. While this phrase may have evoked a particular image of restricted material in the mind of the Solicitor General, who briefed the argument in *Alberts*, it appears clear that the same image does not exist in the minds of many lower courts, and in those censorial groups who now patrol all outlets engaged in the circulation of the press. The "hard core pornography" test has become, as the opinion of the court below reveals, nothing more than a vehicle for suppressing freedom of expression.

It is respectfully submitted that no "compelling interest" has been advanced to justify the treatment of writings dealing with sex as *sui generis* and outside the pale of constitutional protection. Insofar as such writings oppose the moral or ethical standards of the day, they would appear to have the same right to protection as any other writing which attacks accepted conventions. Insofar as such writings create sexual thoughts or sexual desires, they deserve protection nevertheless just as much as writings which arouse political, economic, social or other related desires and thoughts. There does not appear to be any reason why books dealing with sex should not have the same rights and the same limitations as are accorded all other expression under the Constitution of the United States and

the decisions of this Court. There are ample laws available and ample power available for the State to deal with sexual misconduct without invading the area of protected expression. To enforce the provisions of the Constitution is not to weaken the power of the federal government or the power of the States. "It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end." *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 637.

Conclusion.

For the reasons stated, the judgment of the Court below should be reversed.

Respectfully submitted,

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APPENDIX.

Constitutional Provisions and Statutes Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

"Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The provisions of the Fourth Amendment to the United States Constitution are:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

3. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

"No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. The provisions of the general statutes of Kansas (G. S. 1961 Supp., §21-1102; L. 1961, ch. 186, §1; June 30) are:

"(a) Any person who shall import, print, publish, sell, design, prepare, loan, give away or distribute any book, magazine, newspaper, writing, pamphlet, ballad, printed paper, print, picture, drawing, photograph, publication or other thing, containing obscene, immoral, lewd or lascivious language, or obscene, immoral, lewd or lascivious

prints, pictures, figures or descriptions, manifestly tending to the corruption of the morals of persons, or shall introduce into any family, school or place of education or shall buy, procure, receive or have in his possession, any such book, pamphlet, magazine, newspaper, writing, ballad, printed paper, print, picture, drawing photograph, publication or other thing, either for the purpose of sale, exhibition, loan or circulation, or with intent to introduce the same into any family, school or place of education, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than five (5) nor more than three hundred dollars (\$300), or be imprisoned not to exceed thirty (30) days, or both.

"(b) The test to be applied in cases under subsection (a) of this section shall not be whether sexual desires or sexually improper thoughts would be aroused in those comprising a particular segment of the community, the young, the immature, or the highly prudish, or would leave another segment, the scientific or highly educated or the so-called worldly wise and sophisticated, indifferent and unmoved. But such test shall be the effect of the book, picture or other subject to complaint considered as a whole, not upon any particular class, but upon all those whom it is likely to reach, that is, its impact upon the average person in the community. The book, picture or other subject of complaint must be judged as a whole in its entire context, not by considering detached or separate portions only, and by the standards of common conscience of the community of the contemporary period of the violation charged."

5. The provisions of the general statutes of Kansas (G. S. 1961 Supp. §21-1102(c); L. 1961, ch. 186, §4; June 30) are:

"Whenever any district, county, common pleas, or city court judge or justice of the peace shall receive an information or complaint, signed and verified upon information and belief by the county attorney or the attorney general, stating there is any prohibited lewd, lascivious or obscene book, magazine, newspaper, writing, pamphlet, ballad, printed paper, print, picture, motion pictures, drawing, photograph, publication or other thing, as set out in section 1 [21-1102] (a) of this act, located within his county, it shall be the duty of such judge to forthwith issue his search warrant directed to the sheriff or any other duly constituted peace officer to seize and bring before said judge or justice such a prohibited item or items. Any peace officer seizing such item or items as hereinbefore described shall leave a copy of such warrant with any manager, servant, employee or other person appearing or acting in the capacity of exercising any control over the premises where such item or items are found or, if no person is there found, such warrant may be posted by said peace officer in a conspicuous place upon the premises where found and said warrant shall serve as notice to all interested persons of a hearing to be had at a time not less than ten (10) days after such seizure. At such hearing, the judge or justice issuing the warrant shall determine whether or not the item or items so seized and brought before him pursuant to said warrant were kept upon the premises where found in violation of any of the

provisions of this act. If he shall so find, he shall order such item or items to be destroyed by the sheriff or any duly constituted peace officer by burning or otherwise, at such time as such judge shall order, and satisfactory return thereof made to him: *Provided, however,* Such item or items shall not be destroyed so long as they may be needed as evidence in any criminal prosecution."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 449

**A QUANTITY OF COPIES OF BOOKS, HAROLD
THOMPSON AND ROBERT THOMPSON,
d/b/a P-K NEWS SERVICE,
Appellants,**

vs.

**STATE OF KANSAS,
Appellee.**

**APPEAL FROM THE SUPREME COURT OF THE STATE OF
KANSAS.**

BRIEF FOR THE APPELLEE

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vs.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF
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BRIEF FOR THE APPELLEE

OPINIONS BELOW

The opinion of the Supreme Court of Kansas, affirming a judgment that the material here involved is obscene, is reported at 191 Kan. 13, 379 P.2d 254. The trial court's memorandum opinion is unreported but is set out in full in the opinion of the Supreme Court of Kansas.

QUESTIONS PRESENTED

I

Is this paperback pornography obscene and therefore not protected by the First and Fourteenth Amendments?

II

May the trier of fact measure the publication against what he knows to be the community standards, or must the state prove the standards by objective evidence?

III

Are the standards of the "community" those of society at large or those of a defined geographical area?

IV

Under the United States Constitution, is a jury the exclusive tribunal authorized to determine whether or not a publication is obscene?

V

Is the procedure employed in this case a valid method of preventing the distribution of obscenity?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States, and G.S. Kan., 1961 Supp., 21-1102 and 21-1102c, are all set out in the appendix to appellants' brief.

STATEMENT

This is an appeal by Harold and Robert Thompson, doing business as the P-K News Service, Junction City, Kansas, from a decision of the Kansas Supreme Court, which affirmed a judgment by the District Court of Geary County, Kansas, that all copies of thirty-one different "Nightstand" booklets found on their premises are obscene, and ordering their destruction.

The action was commenced with the filing of an information in the District Court by William M. Ferguson, Attorney General of Kansas, on July 25, 1961. The information set out the titles of fifty-nine "Original Nightstand Books," styling them as defendants. It stated that the P-K News Service possessed these booklets or kept them for sale, and that they were obscene and in violation of Chapter 186, Laws of Kansas, 1961 (G.S. Kan., 1961 Supp., 21-1102) (R. 35-36). The information was verified by the Attorney General upon information and belief. Before signing it, the Attorney General acquired and read seven of the titles (R. 19).

Seven of the listed titles, together with the verified information, and a copy of *Marcus v. Search Warrant*, 367 U.S. 717 (1961), were furnished to the District Judge at his home at 5:00 p.m. on the same day (R. 19, Tr. A-31).¹ There were penciled references to certain sections contained in these books (R. 19). The Judge scrutinized these booklets (R. 3), and made notations of his own (R. 24). At 8:30 that evening, after a 45-minute *ex parte* hear-

1. References to "R." are to the printed transcript of the record. References to "Tr. A" are to the reporter's transcript of testimony taken on August 7, 8 and 11, 1961, which is bound in one volume and filed with this Court.

ing, the Judge stated that these seven appeared to be obscene, and further that there were reasonable grounds to believe that any paperback "Original Nightstand" titles which were listed in the caption of the information were likewise obscene (R. 319). He ordered that a warrant issue directing seizure of all copies of the titles listed in the caption of the warrant, which were the same listed in the information (R. 3, 4). Pursuant to this warrant on July 26, 1961, the sheriff seized copies of thirty-one of the listed titles, and no others (R. 35, 5, 6). A total of 1,715 copies were seized (R. 5, 6). At the same time, a copy of the warrant, containing a notice of hearing for August 7, 1961, was left at the P-K News Service (R. 5).

On August 7, 1961, the day named for trial on the merits, Harold and Robert Thompson, as owners of the booklets, filed a motion to quash the information and warrant, asserting that the statutory definition of obscenity was unconstitutionally vague and that the statutory procedure for seizing obscene material was violative of the Fourteenth Amendment (R. 7). Evidence and argument were heard on this motion the same day (R. 15). On the next day, August 8, 1961, the interveners filed a motion for continuance which was granted, and the case was set for hearing on the merits on September 14, 1961 (R. 9, 15). On August 11, 1961, the court overruled the motion to quash. In so doing, he indicated that he was familiar with *Marcus v. Search Warrant, supra*, and that in his opinion the procedure followed in seizing these books met the objections set forth in that case (R. 22-24). On September 6, 1961, the interveners filed a motion for jury trial, which after argument, was overruled by the court on September 11, 1961 (R. 10, 15).

The trial on the question of obscenity began on September 14, and lasted two days (R. 15-16). A copy of each

title seized was introduced into evidence and admitted over objection of interveners. A demurrer to the evidence, on the ground that the state had not introduced evidence as to contemporary community standards was overruled (R. 25). Intervenors then introduced thirty-one works of literature, twenty-nine of which came from the Junction City Public Library (R. 26-28).

The balance of intervenors' evidence was testimony by purported expert witnesses making comparisons between these literary works and the seized booklets. It indicated that there was an absence of four-letter words in the latter although these words appear in the books found in the library; that a description of or reference to the sex act occurs about every ten pages in the seized booklets; that passages from the literary works exceed in candor the descriptions of sex found in the seized booklets; that there are parts of these booklets which do not relate to sex; and that all of these booklets contain some kind of plot (R. 28-34). Intervenors did not present their witnesses as average members of the community. Three of their four witnesses held graduate degrees. The three librarians who testified indicated that none of the seized booklets was in any of their libraries (R. 28-34).

On September 19, 1961, the trial court in a memorandum decision found all of the seized booklets to be obscene and ordered their destruction (R. 16-18). On appeal to the Kansas Supreme Court, the findings and conclusions of the District Court were affirmed in an opinion filed March 2, 1963. From that decision, the intervenors have taken this appeal.

SUMMARY OF ARGUMENT

This case involves the business of smut peddling. This appeal presents two basic questions. First, whether or not the material seized is obscene; and second, whether or not government may restrain the publication of obscenity.

1. Although the definition of obscenity has been stated in many different ways, in substance these statements all amount to the same thing—as this court recognized in *Roth v. United States*, 354 U.S. 476 (1957). The essential question is two-fold, and may be put as follows: (a) does the material deal with sex? and (b) does it do so in a manner offensive to generally accepted standards of decency?

2. The booklets involved here constitute hard-core pornography. They have all the attributes found in such pornography, except some of the four-letter words. The standardization of format, titles and length in these booklets show clearly that they are part of a mass-production industry, which has repackaged hard-core pornography and aimed it at a new and larger market.

3. The test for obscenity functions very much as does the standard of care: in each case a hypothetical man is used as the norm. In obscenity cases, this norm is the man with average community attitudes. (a) As in negligence cases, the trier of fact constructs the norm using the totality of his experience. The parties may desire to put in "evidence" as to what are community standards, but this evidence is really in the nature of argument. It cannot bind the trier of fact; and the state cannot be required to produce it. (b) The word "community," as used

in the test for obscenity, refers to a broad objective standard which is formulated by using an average of all the attitudes known by the trier to obtain in society at large. Geography plays no part in the definition of obscenity, just as it plays no part in the formulation of a standard of care. *Roth*, the Kansas statute, and the courts below all employed the word "community";² and they all used it, as it must be used, to denote not a geographical entity but an average of all the attitudes within the trier's experience.

4. In determining community standards, the trier of obscenity must refer to his knowledge of the various attitudes, current in the community, not to his personal opinion. A judge possesses this knowledge equally with a jury, since he lives in the same community and has the same knowledge of its attitudes which jurors have. It follows that the question whether obscenity is to be tried by a judge or a jury, is one of policy, to be left to the state. The Federal Constitution has never been thought to govern the distribution of functions between judge and jury in state courts. Furthermore, the appellants' argument for a right to jury trial depends on the premise that only a jury is competent to decide community standards. This premise is fundamentally inconsistent with established principles of judicial review in free speech and obscenity cases.

5. The Kansas statute is not a licensing or censorship scheme, requiring prior governmental approval before publication. The seizure now being litigated was effected only after the publication of allegedly obscene booklets, and it was designed to restrain further publication of the same material. The procedure followed was fashioned with

2. Appellants state repeatedly in their brief that the trial judge applied the standards of "Junction City, Kansas." This, however, is a misstatement of the record (See R. 17).

Marcus v. Search Warrant, supra, uppermost in the minds of both prosecutor and judge. Thus the court scrutinized and exercised its independent judgment on the obscenity of the material before any restraint occurred. The seven titles he had before him were completely alike in length, basic content, title and obvious purpose. Concluding that these were probably obscene, he was inescapably drawn to the conclusion that the "other Nightstand Books" with virtually identical titles, named in the back of these seven, were exactly the same in nature. Also, in keeping with the court's objections in *Marcus*, the magistrate directed the warrant only at specific titles, leaving the executing officers no discretion whatsoever in deciding what they were to search for and seize. The total delay occasioned by the state procedure from seizure to final decision was sixteen days, which is not excessive when applied to material claimed to have lasting, not periodical, value.

ARGUMENT

Introduction

In *Roth v. United States*, 354 U.S. 476 (1957), this Court held that obscenity is not constitutionally protected speech. The Court summed up the modern case-law definition of obscenity, saying:

"Obscene material is material which deals with sex in a manner appealing to prurient interest."

The opinion quotes the dictionary definition of "prurient," which is:

"Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity or propensity, lewd."

Although many different statements of the definition of obscenity have been suggested, in substance they all amount to the same thing:.. Obscenity (1) deals with sex, and (2) it deals with it in a manner which offends generally accepted standards of decency. Under every statement of the test, the question is whether the material goes beyond what Judge Learned Hand called "the present critical point in the compromise between candor and shame at which the community may have arrived here and now." *United States v. Kennerley*, 209 Fed.-119, 121 (S.D. N.Y., 1913). There are other ways of saying it. The trial judge in *Roth* told the jury to decide whether the material offended "the common conscience of the community by present day standards." The opinion of this Court in *Roth* used the phrase "appeal to a prurient interest." The American Law Institute adds the requirement that the material exceed "customary limits of candor." Model Penal Code, Proposed Official Draft, §251.4(1) (1962). In another part of the *Roth* opinion, the test is stated to be whether, "to the average person, applying contemporary community standards," there is a "prurient appeal." Other phrases often employed are "lustful thoughts," "lewd thoughts" or "lascivious thoughts." But all of these tests are alike in substance, as this Court recognized in *Roth*. While we do not mean to propose an exclusive statement, we think the essential question may be put as follows: Does the material deal with sex in a manner offensive to generally accepted standards of decency?

It should be added that this Court also held in *Roth* that, in order to protect material legitimately treating with sex, two added safeguards must be followed in applying the definition. First, the material must be judged as a whole, not by isolated passages. Second, it must be judged by its effect on all who might see it, not by its effect on the most susceptible persons.

I. The Books Which Are the Subject of This Appeal Are Obscene and As Such Are Not Constitutionally Protected.

This case deals with the business of smut peddling. These booklets fit exactly Mr. Justice Frankfurter's characterization of "dirt for dirt's sake, or more exactly for money's sake." There is no kinship here with the erotica written by Lawrence, Joyce, O'Hara, Miller, or even Wallace or Metalious.

This Court in recent years has drawn the mantle of First Amendment protection around publications with any semblance of a redeeming social consequence. Comstockery is dead—no militant prosecutor can longer restrain meaningful speech. The issue here is: where is the constitutional line which allows society to protect its basic moral fiber against license. If the line may not be drawn here, it may not be drawn at all.

The First Amendment's protection of speech and press was designed to assure the free exchange of ideas which advocate political or social change, *Roth v. United States*, 354 U.S. 476, 484 (1957). Obscenity, however, contains no such ideas; or if it does, they:

... are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. (*Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).)

On the one hand, obscenity is not utterance of the kind intended to be encouraged and protected by the First Amendment; and on the other, it makes a frontal assault on the foundations of order, morality, and human dignity. The purpose of excepting obscenity from constitutional protection is to allow society to protect itself from obscenity's

debilitating effects. All the states, as well as the federal government, have statutes prohibiting obscenity; and these statutes are founded on the strongly felt conviction that obscenity contributes to the incidence of crime and sexual license. See Report of Subcommittee on Juvenile Delinquency, S.R. 2381, 84th Cong., 2d Sess. 17-23, 60-66. Sexual license, in turn, can undermine the very physical health of a society, as a distinguished group of Swedish doctors has recently pointed out. *Time Magazine*, March 6, 1964, p. 35. From the point of view of individual dignity, it is significant that in George Orwell's *Nineteen Eighty-Four*, the dictatorship mass-produces obscenity in order to keep the proles (people) morally degenerate and hence unable to revolt. These two concepts, (a) the total lack of ideas and (b) the threat to society, are the foundations of Roth.

The booklets in this case fit the Roth rationale perfectly. They are designed solely for the purpose of stimulating the reader sexually, with no accompanying social or political ideas whatsoever. All of these booklets are divorced from reality and their main function is to nourish erotic fantasies in the reader's mind. They are marked by a daydream quality, which two leading scholars have said is a chief characteristic of obscenity, Lockhart and McClure, *Obscenity Censorship*, 7 Utah L. Rev. 289 (1961). The erotic scenes needed for these fantasies recur regularly throughout the book (R. 29) without distracting character development or philosophical discussion. This, too, is a major characteristic of obscenity. Kronhausen and Kronhausen, *Pornography and the Law* (Ballentine, 1959). As may be seen from summaries contained in the appendix hereto, most of the other attributes of obscene literature noted by the Kronhausens are also present in each book:

1. The women are as anxious to be seduced as are the men to seduce them.

2. The females are generally of the nymphomaniac type. They are almost invariably beautiful of face and possess overdeveloped figures. They have no concern whatsoever about pregnancy. Furthermore, there is no trace of modesty or remorse, or fear of venereal disease. Love is almost never mentioned.
3. Defloration is coupled with rape and sadism. The female is generally desirous of the act and obtains exotic enjoyment despite the pain. There is seldom any hostility on the part of the female who has been raped.
4. The males are generally supersexed.
5. Lesbianism is common, since it is assumed to have an erotic effect on the predominantly male audience.
6. Violence and flagellation are common, almost invariably perpetrated on the females.
7. Sexual orgies involving several persons of both sexes are common.
8. Cunnilingus and fellatio occur, as does sodomy per anus. Incest is also present.

This erotic material is hung on an extremely rudimentary plot. The whole is then mass-produced by an industry based on the "commercial exploitation of the morbid and shameful craving" for such materials (*Roth v. United States*, 354 U.S. 476, 496 [concurring opinion of Warren, C.J.]).

The size and nature of this industry become apparent from an examination of the 31 titles involved here. Each is almost exactly the same length. (Sixteen titles have 190 pages, eleven have 191 pages, two have 192 pages, and one has 189 pages). The names of only eleven authors appear among the 31 titles. The titles of the books are standardized:

Born for Sin
 Sin Girls
 Sin Hotel
 Sin Camp
 Sinning Season
 Sin Song
 Sinful Ones
 Sin Cruise
 Seeds of Sin

Sex Jungle
 Sex Model
 Sex Spy
 Sex Circus

Lustful Ones
 Lust Goddess
 \$20 Lust

On the front fly leaf of each book the publisher seeks to whet the erotic appetite with headings such as:

Sex-Hungry Girl
 I'm a Lesbian
 The Price of Sex
 Whose Lips on Her Body
 Hot Pants Marion
 Give Me Your Body
 Lustsated Couples

Similar eye catchers are printed on the back, with such headings as:

Passion Gone Berserk
 Come Sleep With Me
 Unnatural Sex
 A Loose Woman
 Lusty Holiday
 Problems in Bed
 Once a Virgin
 My Mistress and My Son

On the back fly leaf of each book is printed a long list of "Other Nightstand Books."

What we have here is not speech, but a business. The potential for mass-production in this business is shown

by the standardized quality of the books seized, as well as by their number. Seventeen hundred fifteen copies of 30 titles were found in the hands of a single distributor in Junction City, Kansas. Furthermore, booklets identical in format, and basic content, and bearing the same authors' names are distributed under the brands of Pillar Books, Ember Books, Leisure Books, and Midnight Reader Books.

The obscenity industry as a whole was estimated in 1956 to be a half-billion dollar per year business. Report of Subcommittee on Juvenile Delinquency, S. R. 2381, 84th Cong., 2d Sess. 3. was already at that time keeping pace with modern developments in mass communications, *Id.*, at 5. The Kefauver Subcommittee noted then that the readers of obscenity, once they begin, constantly demand something stronger; and that the publishers must supply a given buyer with progressively more jolting doses, in order to hold his business, *Id.*, at 8. In 1956, this industry operated largely in a surreptitious manner. Today, however, as evidenced by the books before this Court, it has begun to come out of the back alleys and onto the legitimate newsstands. See Amory, "Paperback Pornography," Saturday Evening Post, April 6, 1963, p. 10. The publishers have taken aim at a new and much larger market, composed of persons who previously had no exposure to obscenity. To capture this market they have packaged their product to look like ordinary paperback books. They have omitted some of the four-letter words, and they have inserted a semblance of a plot. The dominant theme, however, remains the same, namely, to nourish erotic fantasies; and all the usual attributes of surreptitious obscenity are present.

This is an ancient product in a new package. Once this merchandise gains a foothold among this new and

much larger segment of the public, the publishers will follow their well-known pattern of increasing the strength of the dosage. Group orgies, cunnilingus, fellatio, sodomy, sadism, masochism and rape will appear in more depraved and violent display.

The business represented by these books plays no part in the search for truth and wisdom. The arguments of Milton, Jefferson and Mill were never intended to justify displays of sex and sadism. Jaffe, Book Review, 41 Minn. L. Rev. 239, 240-1 (1957). In protecting itself against the owners of this business, society in no way interferes with the free interchange of ideas which the First Amendment seeks to protect.

II. The Function of the Community Standards Test Is Analogous to That of the Prudent Man Test.

In *Roth* this Court held that obscenity is not constitutionally protected speech and announced as a standard for judging obscenity:

whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. 354 U.S. at 489.

In this statement, *Roth* summed up the holdings of a long line of federal and state cases, many of which are cited in footnote 26 of the opinion. It is in the tradition of these cases that *Roth* was decided; and it is in the perspective of these cases that *Roth* should be understood and elaborated.

Specifically, *Roth* and these earlier cases state a test for obscenity which functions very much as the standard of care functions in negligence cases. The analogy to the standard of care was first pointed out by Judge Learned

Hand in *United States v. Kennerley*, 209 Fed. 119 (S.D. N.Y., 1913). Judge Hand elaborated the analogy in *United States v. Levine*, 83 F.2d 156 (2d Cir., 1936); and it was also pointed out by Judge Woolsey in *United States v. One Book Called "Ulysses,"* 5 F. Supp. 182 (S.D. N.Y., 1933).

Both the question of negligence and the question of obscenity are confided to the trier of fact in the first instance; even though they both involve the application of law to fact. In each case, the trier must construct a hypothetical person to be used as a norm; and by this norm he judges the propriety of the conduct which is in dispute. In negligence cases, this norm is the reasonably prudent man. In obscenity cases, it is the man with average community attitudes. If the material deals with sex in a manner offensive to this representative man, then the trier should find it legally obscene.

A. Community Standards Are Not an Objective Fact Which the State Must Prove.

In negligence cases, the reasonably prudent man is constructed from the everyday experience of the trier of fact. When there is a jury, a standard instruction tells the jury to use its own experience; and a judge sitting alone uses his experience in the same way. There is no requirement that the parties submit proof as to the standard of care, and ordinarily they do not. They will probably make vigorous oral argument as to what a reasonable man would have done; but that is because a question requiring application of law to fact is being decided.

The trier of obscenity, in constructing a standard, must likewise consult his own experience as a member of the community. The parties may desire to submit "evidence" as to what is the average community response to the al-

legedly obscene material. But this evidence is really in the nature of argument. As argument, it may in some cases be persuasive. But it can never be binding on the trier of obscenity. Nor can the state be required to submit such evidence. As Judge Hand put it in *Levine*, such evidence may sometimes be helpful, but "in the end it is the [trier of obscenity] who must declare what the standard shall be." 83 Fed. at 158.

The view that the trier of obscenity consults his own experience has been followed throughout the history of litigation in this area. In *Roth* itself, this Court approved a charge to the jury which said:

In this case, ladies and gentlemen of the jury, you and you alone are the exclusive judges of what the common conscience of the community is, and in determining that conscience you are to consider the community as a whole . . . 354 U.S. at 490.

This charge completely rejects the proposition suggested by appellants that the community standard is an objective fact which the state must prove. Appellants cite no cases in support of that proposition; and there are no such cases. In fact, Mr. Justice Harlan expressed an assumption running through the entire case law when he said that the state may regard "the trier of fact as the embodiment of community standards." *Smith v. California*, 361 U.S. 147, 171 (1959) (Separate opinion). Even the appellants recognize that this is the role of the factfinder, when they argue that a jury must decide obscenity because only a jury knows from its experience what the standards of the community are.

To say the trier of obscenity may consult his own experience is not to say he may impose his personal standard on the material in question. He must decide, from his

experience as a member of the community, what he thinks the average person's response to this material would be. In making this decision, he may be aided by argument or evidence, but he cannot be confined to it; and the state cannot be required to produce it. The average man is not an objective fact, but a legal standard which the trier of obscenity must formulate in each case.

B. The Standards of the "Community" Are Those of Society at Large, Not Those of a Defined Geographical Area.

The *Roth* case, as noted above, uses the response of the "average person, applying contemporary community standards." The statute under which a finding of obscenity was made in this case contains virtually identical language, i.e. the "impact upon the average person in the community." It also incorporates a phrase from the charge approved in *Roth*, i.e. "the common conscience of the community." G.S. Kan., 1961 Supp., 21-1102(b). Following both the *Roth* case and the statute, the trial judge stated the standard to be the "effect on the average person residing in this community" (R. 17).³

The use of "community" in the test for obscenity appears to have begun with the opinion of Judge Hand in *United States v. Kennerley*, in which he asked:

Should not the word "obscene" be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now? 209 Fed. at 121.

Later, in *United States v. Levine*, Judge Hand reiterated that the question is "the standing of the works in the minds

3. In their brief, appellants quote the trial judge as saying he used the standards of "Junction City, Kansas." This is a misstatement of the record.

of the community." 83 F.2d at 158. In the *Roth* case itself, the trial judge instructed the jury:

You may ask yourselves does it offend the common conscience of the community by present day standards? 354 U.S. at 490.

As we noted earlier, the view taken in each of these cases is that the trier of fact constructs a standard for judging obscenity from his experience, just as he does in a negligence case. "These cases use the word "community" to emphasize that the trier is not to apply his personal view even though it is derived from experience, but is to employ an objective standard using his experience among all kinds of people. As the trial judge said to the jury in *Roth*:

[Y]ou are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious—men, women and children. 354 U.S. at 490.

"Community," as used in these cases, does not refer to a geographical unit of any kind. Geography plays no part in the definition of obscenity, just as it plays no part in the formulation of a standard of care. Nor can it play any part, for experience does not come in neat geographical packages. It is manifold, encompassing knowledge of attitudes derived from family, travel, school, military service, mass media and business. It is this experience which the word "community" seeks to capture, in order to insure that a broad and objective standard will be used in judging obscenity.

This is the sense in which "community" is used in the cases leading up to *Roth*. Since *Roth* summarized these cases, we assume that it used the word in exactly the same sense. The "average person, applying contemporary community standards," is not a standard linked to geographical

boundaries. The trier must, of course, consider the material as a whole; and in judging its appeal, he must not concentrate on groups inordinately susceptible to sexual stimulation. Within these two guidelines, he must decide whether the material deals with sex in a manner offensive to the "average person," who is a distillation of all he knows about the attitudes of people of all kinds.

Roth, then, does not employ a geographical standard. Nor does the Kansas statute, which incorporates the language of *Roth*. The judge who made a finding of obscenity in this case follows the *Roth* case and the statute, in the language of his opinion. All three use the word "community;" and they all use it, as it must be used, to denote not a geographical entity but an average of all the attitudes within the trier's experience.

III. The First Amendment Does Not Require the State to Afford a Jury Trial on the Question of Obscenity.

Appellants argue that a jury must decide the question of community toleration, because only a jury "represents" public opinion. A judge, it is said, represents only his own class or group; but a jury contains representatives from many groups. This assumes, however, that the question of standards is to be answered by the trier's personal opinion. The gist of the argument is that twelve opinions are more likely to approach the community average than one. This completely misconceives the function of the trier of obscenity. He must apply his knowledge of community attitudes, not his personal opinion. *Smith v. California*, 361 U.S. 147, 171 (1959) (separate opinion of Harlan, J.). The standard is a hypothetical average. No twelve personal opinions could possibly be representative of the entire community's attitudes, in any case.

If it is not opinion but knowledge of attitudes that counts, then a judge possesses this knowledge equally with

a jury. He lives in the community, just as jurors do. He knows the attitudes of society at large at least as well as they do. Furthermore, the question of obscenity involves the application of a legal standard to a group of facts; and this is a task within the peculiar competence of judges. Even the question of negligence, which is normally for a jury, is often decided by a judge sitting alone. In fact, it has been suggested that judges will be more circumspect than juries in deciding whether a given book is obscene and hence constitutionally unprotected. See Bickel, *The Passive Virtues*, 75 Harv. L. Rev. 53 (1961).

We do not suggest that either a jury or a judge is superior, but that the choice between them is one of policy, to be made by the state. The First Amendment cannot be said to render either one incompetent to decide the question. In this connection, we point out that the Federal Constitution has never been thought to govern the distribution of functions between judge and jury in the state courts, *Chicago, Rock Island & Pacific Ry. Co. v. Cole*, 251 U.S. 54, 56 (1919). The jury trial guaranties of the Sixth and Seventh Amendments are not incorporated in the Fourteenth, *Fay v. New York*, 332 U.S. 261, 288 (1947); and there are no decisions of this Court, in any kind of case whatsoever, holding that the Federal Constitution requires a jury in a state court.

There is a further reason for rejecting appellants' argument that a jury is constitutionally required. Their argument depends on the premise that only a jury is competent, under the First Amendment, to decide the extent of community toleration. It would follow from this that a judge is constitutionally incompetent to decide the question. But community toleration is a constitutional standard. *Roth v. United States*, 354 U.S. 476 (1957). If material does not meet this standard, it may be suppressed; if it

does, it is constitutionally protected. As a constitutional question, community toleration must ultimately be decided by the court on appeal. *Manual Enterprises v. Day*, 370 U.S. 478, 488 (1962) (separate opinion of Harlan and Stewart, JJ.); *Grove Press v. Christenberry*, 276 F.2d 433, 436 (2d Cir. 1960); *Zeitlin v. Arnebergh*, 59 Cal. 2d 901, 908-910 (1963); *People v. Richmond County News*, 9 N.Y. 2d 578, 580-81 (1961).

This is in line with other free speech decisions of this Court. Whenever the speech being punished is claimed to be protected by the First Amendment, this Court makes an independent application of First Amendment standards to the record before it. *Edwards v. South Carolina*, 372 U.S. 229, 235-6 (1963); *Niemoiko v. Maryland*, 340 U.S. 268, 271 (1951); *Feiner v. New York*, 340 U.S. 316 (1951). The Court, in reviewing an obscenity case, should follow the same rule; otherwise, "it would be abdicating its role as an arbiter of constitutional issues." *People v. Richmond News*, 9 N.Y. 2d at 581.

However, if the question of community toleration is decided by the Court, as it can and should be, then it simply cannot be said that judges are incompetent to determine the extent of that toleration. Presumably, this Court made such a determination itself in the four *per curiam* decisions of 1957, which reversed findings of obscenity (*Times Film Corp. v. Chicago*, 355 U.S. 35; *Mounce v. United States*, 355 U.S. 180; *One, Inc., v. Oleson*, 355 U.S. 371; *Sunshine Book Corp. v. Summerfield*, 355 U.S. 372). Both parties in the case at bar argue the question of obscenity on the assumption that this Court is competent to decide community standards. Appellants' argument for a jury trial of right in obscenity cases is fundamentally inconsistent with the established principles of judicial review in such cases.

IV. The Procedure Followed in This Case Is a Valid Method of Preventing the Distribution of Obscenity.

The Kansas seizure statute is not a licensing or censorship scheme, covering all publications, but is only directed at those threatened publications sworn to be probably obscene. Not all books are required to be submitted or approved prior to publication, nor may all be seized. The seizure now being litigated resulted from the purchase of a number of booklets at retail—after publication (R. 19). Under the procedure employed here, preventive measures were initiated only when the state became aware of the obscene nature of the publication after the fact of publication. The effect of the seizure was not to restrain publication before the offense, but to restrain further publications once their nature had been demonstrated.

Appellants had published a number of volumes, obscene in the eyes of the State, and threatened to continue publishing them and other works of the same nature. The State determined that the most effective remedy would be to prevent further publication, rather than merely to punish for the past publications. In Kansas, the preventive remedy available was the seizure statute in question.

Kansas' problem, then, was to follow the course marked off by *Kingsley Books, Inc., v. Brown*, 354 U.S. 436 (1957), avoiding the pitfalls of *Marcus v. Search Warrant*, 367 U.S. 717. Certainly, as regards material claiming First Amendment protection, extraordinary procedural safeguards are required, *Kingsley Books, supra*. The State of Kansas would be satisfied with no less.

Viewing the procedure employed here in the light of that found objectionable in *Marcus v. Search Warrant*, it must be remembered that the enabling legislation was passed by the Kansas legislature in April, 1961, while

Marcus was decided in June of the same year. The procedure employed, however, was fashioned with *Marcus* foremost in the minds of both prosecutor and judge. A copy of the *Marcus* opinion was furnished to the judge along with the information (Tr. A-31). Thus, in meeting the specified objections in *Marcus* the trial court: (1) had before it, scrutinized and exercised its independent judgment on the obscenity of the material before any restraint took place; (2) directed the warrant only at named material—no catch-all restraint was imposed against all “obscene” material; (3) afforded a speedy trial on the issue of obscenity to appellants and their publications.

On the first point, appellants complain that the magistrate had insufficient time before issuing the warrant to do more than “scrutinize” the offending books. That term was employed by the judge (R. 3), obviously borrowed from *Marcus*, 367 U.S. at 732, to meet the objection that the material there had been seized “without any scrutiny by the judge of any materials considered by the complainant to be obscene.” Seven titles had been in the judge’s possession for three hours prior to the 45-minute hearing, at the conclusion of which he determined that the books were probably obscene and that a warrant should be issued (R. 3, 19).

It is also contended that, from the material before the magistrate, he could not reasonably conclude that the other specific titles mentioned were also obscene. The pattern before the judge was clear. He had before him seven booklets, as alike as peas in a pod, in length, basic content, title, and obvious purpose. At the end of each was a list of other titles bearing the same brand, with the suggestion that the reader of one would also enjoy the others. Could the judge reasonably infer that, if the booklets before him were obscene, these others were probably also obscene? The book-

lets' titles, of course, necessarily betrayed the nature of their contents. Thus we had "Sin Camp," "The Isle of Sin," "Sin Cruise," "Seeds of Sin," and "The Sinful Ones." The titles also prominently featured "Lust," "Sex," and "Orgy." Each volume before the judge proclaimed that it was "an original Nightstand Book" and advertised that the other volumes were also "Nightstand Books." To the examining magistrate there was presented no reason to suspect that there might be a literary gem amongst this utterly crude ore, and appellants do not now claim there was one. The inference that the other volumes listed were of the same character as those presented to the court was not only reasonable but inescapable.

Appellants would also have this Court believe that there was a general warrant issued, thus attempting to come within the terms of *Marcus*. The record is clear, however, that 59 specific titles were listed in the information and warrant and that 31 of these 59 were found and seized (R. 35, 5-6). The officers executing the warrant had absolutely no discretion as to what they were looking for or what they were to seize, and they exercised none.

On the third point, appellants make much of the fact that the Kansas statute contains no *requirement* that there be a speedy determination. In setting a trial date, there would appear to be two conflicting interests to be accommodated. First, action must not be so precipitous as to deny a claimant the opportunity to defend his publication and make adequate preparation for the hearing on obscenity. Secondly, the decision on the ultimate issue must not be delayed so as to destroy any value the material may have if it is of only current interest, and if it is determined to be non-obscene. Resolving this conflict, the Kansas legislature decreed that the hearing should be not less than ten days from the seizure. In the case at bar, it was

twelve. There was some further delay, but only at the instance of the appellants (R. 9, 15), and the decision on obscenity was rendered four days after the termination of a two day trial (R. 16). The total delay occasioned by the state procedure, from seizure to determination, thus amounted to sixteen days. This can hardly be deemed excessive when applied to material claimed to have lasting entertainment value.

It has been suggested that the seizure remedy used here should not be given the same constitutional status as the temporary injunction approved in *Kingsley Books, Inc., v. Brown*, 354 U.S. 436 (1957). In fact, however, these two remedies vary, if at all, only in efficiency and not in quality. Publication in violation of a temporary injunction necessarily subjects the publisher to punishment for contempt. The non-obscenity of the published material cannot be made a defense to a contempt prosecution. If it were, the court's injunctive process would be totally undermined. It is a universal rule that the correctness of a court's order cannot be attacked in contempt proceedings, so long as the court issuing the order had jurisdiction over the parties and subject matter. *E.g., United States v. United Mine Workers*, 330 U.S. 258, 293 (1947). The *in terrorem* effect of the contempt sanction, therefore, serves exactly the same purpose as seizure—to prevent further publication. The threat of jail is no less efficient for that purpose than seizure.

Finally, appellants suggest that the verification of the information "on information and belief" renders it fatally defective. This argument ignores the facts in the case, which include the production before the magistrate of the sample volumes themselves, the magistrate's preliminary determination that they were obscene, and the evidence concerning where they were obtained (R. 3, 19). The is-

suance of a warrant under the Kansas statute requires a showing of three elements, that the material is obscene, that it is held for sale, and the place where it is held. To require a complainant to swear to all of these elements positively would be to require the impossible. In the nature of things, if the courts are to have the final say, a complainant can only say that he *believes* these elements exist. To justify seizure, the court, on the basis of the evidence before it, determines whether that belief is reasonable. Certainly a positive oath that the material is obscene could and should have no effect on either the initial decision on probable cause or the ultimate decision on obscenity.

CONCLUSION

For the above reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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APPENDIX

Here follows a brief summary of the seized booklets, with the pages of some of the obscene passages indicated. The State has included excerpts from a few of them to demonstrate the tenor of the seized books.

1. *"Born for Sin"*, by Al James, No. NB1510R.

A nymphomaniac who works her way from small town truck stop to the big city and back peddling her body.

Obscene passages are to be found at pages 12, 32, 33, 42-45, 52, 53, 65, 66, 93-95, 109, 110, 132, 147, 148, 169.

2. *"No Longer A Virgin"*, by John Dexter, No. 1513R.

This is a story of a small-town girl who lives only for those moments when men's hands, sometimes several pairs, are caressing her body, particularly her overdeveloped breasts. When she fails to reach an orgasm with the hometown boyfriend, she moves to the large city where her aspirations are many times fulfilled.

Descriptive passages:

Perfect figures—5, 8, 21.

Nymphomania—5, 6, 7, 10.

Defloration—7, 8.

Narcissism—10-12.

Fellatio—22.

Cunnilingus—22.

Descriptive intercourse—22, 23, 38, 118, 135, 153, 165, 189.

Lesbianism—75, 76, 77.

Sadism—81.

3. "Sin Girls", by Marlene Longmon, No. 1514R.

Leslie, a virgin, is raped and as a result becomes a lesbian and then a lesbian prostitute. On the last page, she is rescued from lesbianism by a heterosexual affair.

Descriptive passages:

Lesbian intercourse—11, 42-44, 51-53, 57, 66-68, 74-76, 151, 152, 158, 160, 177, 180.

Rape—21-24.

Sadism—77-78.

Masochism—160.

Group orgy by four lesbians—94-97.

Four lesbians rape a male homosexual—105-109.

Seduction of non-lesbian by a lesbian, ending in suicide—120-123.

4. "Sin Hotel", by Don Holliday, No. 1518R.

This is a story of mixed prostitution, lesbianism and homosexuality. Particularly descriptive passages are to be found on pages 12, 13, 15, 19, 35, 49, 53, 56, 79, 84, 90, 92, 102, 105, 117, 120, 131, 134, 168, 183. Total number of pages, 191.

5. "Miami Call Girl", by John Dexter, No. 1519R.

A small town girl becomes a high-priced Miami prostitute. She marries a homosexual attorney who sells her favors to his clients. In the end, he is killed and she marries her former pimp and lives happily ever after.

Descriptive passages:

Male sex organ and/or erection—7, 30, 32, 128, 133, 152.

Vagina and/or pubic hair—14, 130.

Incest—16-17.

A woman orgies with large group of men as her husband looks on—115-117.

A3

Descriptive intercourse—6-7, 14-16, 19, 27, 33-34, 38-42, 57-59, 68-69, 83-84, 96-97, 104-105, 128-130, 132-133, 136, 151-153, 166, 167, 170.

6. "*Lesbian Love*", by Marlene Longmon, No. 1523R.

Following her seduction by her female school teacher, the heroine tries heterosexual activities but returns to her first love, lesbianism.

Descriptive passages:

Perfect figure—5, 6.

Lesbianism—6, 7, 8, 49, 55.

Descriptive heterosexual intercourse—12, 22, 67, 149.

Homosexuality—page 116.

7. "*Sex Jungle*", by Don Elliott, No. 1524R.

This is a story of juvenile gangs in New York and the sexual activities of these gangs, with an admixture of incest.

Descriptive passages:

Intercourse

—with girl friend—8, 10, 52, 111, 132, 161, 167, 175.

—with one girl forty times in one day—45.

Orgy in which twelve couples participate—73.

Sadism—76, 161.

Rape—113, 117, 118, 120.

Masturbation of girl with an ear of corn ("She liked it")—45.

Chapter six beginning at page 73 and continuing to page 85 is a description of Golden Dragon gang initiation. The initiate is required to have intercourse with three of the gang's girls while the rest observe. Excerpts are as follows:

"I was quiet for a minute. Hell, laying three girls in a row isn't the easiest thing in the world to do. And doing it in front of a mixed audience was a bitch of a job. But we had done plenty of fooling around in the Shining Sinners. Orgies, the newspapers would call them. Ten or twelve couples all naked, doing it at the same time. That wasn't quite the same thing as what I was asked to do here. But other times we had screwing exhibitions, and me and Flora had had our turn at them while the rest of the gang and the debs stood around and watched and made bets and all. So I wasn't embarrassed by the idea, if you get me. Just a little worried. I wanted everything to work out right.

* * *

"But one rule around a gang is that the deb is her stud's property. When a caper is planned, the deb don't raise objections. Once she hooks up with a gang kid, she does what he wants. And if he wants her to strip down and lay publicly for a stranger, she does it—or else.

* * *

"'Lora first,' I said.

* * *

"Lora started to strip. She pulled her black jersey up over her head and dropped it to one side. She didn't have any bra on underneath, and her big breasts swung from side to side. They were the biggest I'd ever seen. Huge. They had little dimples in them, they were so big. They started right below her collarbone and must have gone a foot down her chest, as well as sticking out a foot.

"She stood there with those enormous boobs sticking out, and every eye in the room fastened right on her.

* * *

"I tightened on her breasts, feeling my fingers sink deep onto their spongy fatness, and I lowered my

head to her shoulder and took a bite out of her, and I drove myself deep into her . . .

"And she came alive.

* * *

"Which girl next?" Jimmy Nails asked.

* * *

"Joanne came forward. She was very nervous, I could tell. Close up, I saw that she couldn't have been much more than fourteen or fifteen at the absolute tops.

* * *

"We moved slowly at first, then faster, and I felt the tingling begin and knew that this was going to be a fast one for me, and I tried to heat her up, doing everything I could for her, only nothing seemed to get through to her.

* * *

"Somebody offered me a can of beer and I took it and drank about half of it. Then I turned, looking for Lisa. She was sitting on the couch, and when I looked at her her face put on an interesting smile. Christ, she was beautiful. Sleek and smooth and soft and satiny, and a mischievous look in her eyes.

"Come on," I said to her.

"She rose and came over to me. 'Do you want me to undress?' she asked.

"I'll undress you," I said.

* * *

"I pulled the sweater over her head. She was about five six or so, a tall girl. I took the sweater off her and unhooked her bra, bringing it forward off her breasts.

"She was built.

"Her breasts rose high and firm, and they were pale white, sort of creamy color with a glow of their own. The nipples were small and pinkish-red, and

they sat near the top of the curve, looking up at me. My hands shook a little as I put them on those two round ripe boobs of hers.

"This was plenty woman, all right. Mike Reilly had himself quite a piece.

* * *

"Her fingers wandered magically. I began to breathe harder. I had my hands on her breasts, and the nipples were stiff against my palms, and I was looking into her eyes and seeing strange flecks of gold there, and our bodies were very close and yet still I was helpless, but the excitement was growing in me, growing by the minute as she used all of her skill, and then we were kissing, her tongue like a hot dart in my mouth.

"And it began to happen.

"I don't know the exact moment. One moment I was helpless, and the next I was on fire, burning up in the flame of her body, entering her, and she was moving, doing things with the muscles inside her, and when I opened my eyes for a moment I saw her with her eyes closed and still smiling, and then her fingers were raking line down my back and she was starting to moan, and I was carried away with her as sounds started to come out of her throat and mine, and it was like this was the first time I had ever done it with a girl, and the world was full of light and I felt the shudder of delight and rockets going off inside my head, and Lisa was stiff against me, her whole body shaking with pounding delight, and I felt it flowing through me like an electric current, and it was oh and oh and oh again, the current flowing through both of us, jolt after jolt, after jolt, and we were way up far out, and then it was ending, hard as we tried to hang onto it it was ending, and down we came out of the stratosphere and it was all over, and I gasped for breath and pillowed down between Lisa's wonderful breasts and shook with exhaustion.

"I was beat.

"But I had passed the test."

His sister is also initiated. At page 105:

"All it was, was Johnny and Sis on the mattress with each other. But for me it took hours. It's a hell of a thing to watch your sister, giving an exhibition in front of a couple of dozen strangers. And Sis was good. She wasn't any scared virgin. She forgot all about the audience, and really cut loose with Johnny Slash."

8. "*The Lustful Ones*", by Clyde Allison, No. 1525R.

Theme is sex among the inhabitants of Greenwich Village. A young artist is the virile protagonist.

Descriptive passages:

Two-day orgy of intercourse and drinking by two men and two girls—157-166.

Fellatio—163.

Descriptive intercourse—20, 27, 66, 105, 108, 110, 138, 140, 160, 162, 164, 166.

9. "*The Wife Swappers*", by Andrew Shaw, No. NB-1526R.

The Story concerns a suburban sex club consisting of eight perfectly-developed, sexually insatiable couples. The erotic play during the frequent orgies includes both heterosexual and homosexual activities.

Descriptive passages:

Perfect figures—5, 59, 66.

Descriptive intercourse—18, 21, 67, 84, 93, 119.

Sadism—22, 31, 68.

Nymphomania—27, 92.

Lesbianism—39, 41, 82, 85, 119.

Perversion—80, 82.

Sodomy per anus—155.

Request for fellatio—155.

10. "*Sex Model*", by Al James, No. NB1527R.

Oklahoma farm girl becomes a prostitute in Chicago. Eventually she is shot down gang-land style.

Descriptive passages:

Intercourse by two teenagers on a bus in mid-afternoon—9-11.

Man pays a prostitute to have intercourse on same bus—30.

Descriptive intercourse—38, 47, 103, 112, 130.

Attempted rape—58-59.

Girl strips for several men—66, 83-86.

11. "*The Lecher*", by Don Elliott, No. NB1528R.

The protagonist in this story is an IBM operator who seduces a man and his son with the ardor of a nymphomaniac. Her desires are insatiable, while her playmates' abilities to perform sexually are immeasurable. Continuous intercourse is the yardstick of happiness.

Descriptive passages:

Perfect figures, descriptive nudity—7, 14, 16, 47, 58, 110.

Nymphomania—12, 13, 14, 24, 48, 124.

Descriptive intercourse—30, 31, 32, 48, 108, 124, 125.

Perversion—66.

Sadism—189.

12. "*Lust Goddess*", by Don Elliott, No. NB1544.

With a theme of nymphomania and sadism, this story describes sexual excess by supersexed males and insatiable females. The heroine is consumed with a compulsion to control all males with whom she comes in contact.

Descriptive passages:

Perfect figure and descriptive nudity—6, 9, 12, 20, 47,
73, 110.

Nymphomania—10, 19, 55, 79, 180-185.

Descriptive intercourse—20-22, 55-57, 80, 98-100, 113,
132.

Sadism—63, 141, 148, 151, 153, 176, 188.

Defloration—116.

13. "Sin Camp", by Anthony Calvano, No. NB1545.

Theme is illicit sex at an army camp.

Descriptive passages:

Prostitution—23.

Lesbianism—110.

Sadism—110, 174.

Rape—110.

Descriptive intercourse—23, 55, 76, 89, 90, 94, 119, 128,
130, 133, 157, 169.

14. "\$20.00 Lust", by Andrew Shaw, No. NB1546.

Central theme is prostitution, with a counterfeiting
ring in the background. Murder and violence are over-
shadowed only by the heroine, "who had more than a feel
for love."

Rape—14.

Fellatio and flagellation—73-74.

Descriptive intercourse—47-49 (three times with same
girl), 80-81, 83, 99, 108, 150, 158, 160, 186.

15. "Convention Girl", by Don Elliott, No. NB1547.

The story of a convention call girl's exploits, with
murder thrown in.

Descriptive passages:

Defloration—38.

Rape—74.

Flagellation—110.

Lesbianism—107, 148.

Descriptive intercourse—27, 33, 77, 100, 131, 143, 151.

16. "*The Isle of Sin*", by John Dexter. No. NB1549.

The central theme of this is sex by beatniks on a vacation island. Descriptive passages are on Pages 9, 23, 48, 49, 83 to 85, 121 and 122, 131 and 132, 177 to 179. Total pages 190.

17. "*Orgy Town*", by Will Newbury, No. NB1550.

While on a mission to rescue a wayward girl, for which he has been paid by sexual access to the sister, the central character visits teenage vice dens and takes part in orgies in the bushes, on the beaches and in bedrooms.

Descriptive passages:

Perfect figures, descriptive nudity—pages 30, 31, 40, 73, 136.

Descriptive intercourse—72, 124, 125, 181, 182.

Nymphomania—pages 72, 122.

18. "*Sex Spy*", by J. X. Williams, No. NB1552.

The story about a female spy in a Latin American county. Descriptive passages are at Pages 35, 38, 46 through 49, 62 to 64, 66 to 69 (attempted rape), 82 to 84, 97 to 98, 104 to 109, 120 to 123 (sadism and rape), 134 to 135, 143, 148 to 150, 165 to 166, 177 (lesbianism), and 190 to 192. Total pages, 192.

Sadism is herein graphically portrayed beginning at page 119:

"The eyes of the soldiers gleamed moist with lust as they watched Glory awaken. Glory knew she was nude, knew her moist intimate areas were fully exposed, but she did not care.

"Bols said. 'Are you awake, Senorita Carter? Ah, I see that you are. Will you answer a question or two?'"

...

"Bols leaned forward to await her reply. Glory spat directly in his face.

...

"Very well, Senorita Carter. Pepe, give her a taste. Arnolfo, you and Grigori hold her down."

...

"Again Glory snapped her head forward and spat at him. Bols raised a sleeve to wipe his cheek.

"That is your answer, is it?" he said in a velvet whisper. "Pepe? Burn her . . .!"

"Pepe extended the lighted twist of straw to touch Glory's breast. She screamed.

"Pepe stamped the twist under his boot, selected another and held it close to the lantern. His gross lips shone with saliva through the matted filth of his beard.

"Those soft lovely nipples," Bols said. "Imagine how they will look blackened and scarred. No man will want to fondle them or kiss them. Your name! Your real name!"

...

"Glory writhed, struggled to get free as the flame hovered close. It sent searing agony through her, agony that poured out of her lips in a long, shrill shriek of pain. She collapsed weakly between her captors, hoping they'd let her rest a moment.

"Let us try a more intimate area," came the voice of Bols. "Arnolfo . . . Grigori . . . hold her arms with one hand. Excellent. Ready, Pepe? Get the twist lighted. There. Now, gentlemen, a hand on the young lady's thighs. Pull them apart . . ."

"Oh, my God, my God, no!" Glory screamed. "You can't you wouldn't . . ."

"I will unless you tell me what I wish to know, Senorita."

"Oh, God, oh, God, no please, please don't . . ."

"Pepe?"

"No, no, don't burn me there, don't burn me there . . .
ARRRRRR . . ."

"The revolting stench of smoldering flesh gagged Glory, turned her sick and weak. The smell and the pain plunged her down, down, into black and bottomless oblivion."

"But once more she came awake, wishing for death now, wishing for release. Through the blur of her pain-dimmed vision she saw Bols' face like a phantom in a trick mirror, elongated and hideous, the mouth working in a mocking smile."

"You are a remarkable young woman. You have been trained. No ordinary American girl would withstand such pain without speaking. But we shall have plenty of time. Senorita, please pay attention!"

"A hand knotted in her hair, jerking her head up. Three stinging slaps brought her eyes flying open."

"Better," Bols purred. "Since our questioning will obviously take longer than I had planned, perhaps I should call a halt and give my faithful helpers a chance to appreciate your distinctive charms for themselves. Pepe? Shall you be first to invade the portals of joy?" Gazing up through a lock of hair falling across her forehead Glory could see the bearded Pepe shuffle forward along the truck bed, toying with his belt as he licked his lips. Bols picked up the lantern, held it high. It swayed back and forth with the rhythm of the truck bouncing over a bumpy road.

"Grigori, you and Arnolfo should assist our friend, to assure the young lady's cooperation. Be prompt, Pepe. We cannot have too many more miles to go."

"Glory tried to scream again, scream and clamp her thighs tight together as Pepe's nailed boot stamped cruelly between them and forced them apart. Then

he dropped to his knees, put one hand on each of Glory's knees, slowly wedged them wide.

"The other two soldiers dropped to a crouch, one on either side, holding her legs wide, keeping her shoulders pinned to the foully matted straw. Bols' twisted face retreated in her vision, a surrealistic nightmare under the swinging beam of the lantern."

"'Be quick,' he laughed, 'be quick, comrade Pepe. Your actions will arouse our brothers, who wait their turns. And do not be easy, comrade Pepe.' His voice quaked uncontrollably: 'Rape her!'

"Now Pepe's loathsome bearded face descended over Glory's. She writhed, tried to fight, but pain had taken its toll. In one final instant of agony Glory screamed Antonio Rey's name, but it came out a wordless syllable. With brutal strength, Pepe assaulted her. As his fellows began to cry their encouragement Glory's mind again went mercifully dark."

As is flagellation at page 156:

"Stretched on her belly on the floor, Glory saw his arm raise up. She raised her own hand protectively.

"'Antonio! In the name of God, darling . . ."

"Crack!

"Glory screamed and twitched across the floor. The whip had cut the straps of the slip, ripped the bodice to tatters. Her pulsing white breast heaved up into the light. A tracery of blood was cut across their upper surfaces.

"Glory moaned, rolled from side to side, digging her fingernails into her thighs to stifle the pain. The whip hissed along the floor as Antonio coiled it. His arm flashed up. His mouth contorted in rage:

"'You'll never use your body again. Never again . . ."

"Crack!

"The lash coiled around Glory's buttocks, tore free, cutting her slip to ribbons. It left another red

mark across her belly and the rounded bulges of her quivering buttocks.

"Glory tried to crawl away. The pain was too severe. She could not speak. Words choked in her throat. She waited the next blow, wishing it would strike her dead. Everything was finished now, destroyed. Feebly she pressed her hands over her loins, trying to protect herself. The whip hissed coiling . . .

"Crack!

"Crack!

"A long, piercing scream tore out of Glory's throat. She went scrabbling over the floor, her breasts crisscrossed with whip-marks. Bloodstained her nipples, trickled down her belly, marked her thighs and buttocks."

And desire for seduction at page 149:

"Darling . . . my darling . . . have me, my darling . . . I ache . . ."

"Querida,' Antonio's voice whispered down the dream-wind, 'Queida, I want you so . . .'

"Don't make me wait. Antonio . . . give me your love . . . let me have your love . . . oh, please . . ."

"Yes, Querida, yes, I'll give it to you . . . let me be gentle as I give . . ."

"No, Antonio . . . oh, darling no. I have to love you hard, hard . . . please, Antonio . . . lover . . . it's like fire . . . I can't wait . . . please, sweetheart, give . . . ohhhhhhh! Oh, yes, yes, that's it, that's it, my darling, my lover, my darling . . ."

And sodomy beginning at page 105 through 109:

"Hurt me . . . hurt me, I don't care . . . just start . . . start . . . or . . ."

Bols arms went around her like a vise.

"Then you have been warned."

"That's it, yes . . . yes . . . oh, yes, that's wonderful, that feels . . . Bols! Bols, what are you . . ., no, Bols . . . no. I won't . . . not that . . . I won't let . . . Bols . . ."

"Glory's fists beat at him, hammered at him mercilessly. He pressed on, his strength overpowering. The spasm which seized Glory was an evil thing, foul and loathsome as Bols caressed her with never a trace of emotion on his stark, sweat-dripping face.

"Again Glory tried to struggle, but her balled fists beat ineffectually at his shoulders.

"'Bols . . . you mustn't . . . Bols . . . don't . . . don't . . . ah, God, Bols, stop, stop . . . stop . . . stop before you . . . agh!'" . . .

"'Tell me to stop,' Bols snarled. 'Tell me you really want me to stop.'

"'Yes, . . . ah . . . ah . . . oh God . . . the hurt I can't bear . . . I . . . won't.'

"'Shall I stop?'"

Bols' voice came like thunder, mocking her, making her filthy, a degraded thing.

"'Shall I stop now, my darling Jean? Or shall I go on to the end? If you say stop . . .'

"'Yes you must . . . you . . . what's happening to me?'"

"'Do you want me to go on? Do you want me to go on, Jean? Do you? DO YOU?'"

And with terrible wanton abandon Glory opened her lips and screamed:

"'Yes . . . yes . . . yes . . . it's too late . . . go on! go on, go on!'"

* * *

Never in her life had Glory Hill felt so soiled, so thoroughly degraded.

"Bols left her sprawled naked. Distantly she heard his mocking laugh."

19. *"Trailer Trollop"*, by Andrew Shaw, No. NB1553.

This is the story of a group of females who operate a trailer-house of prostitution near an army camp.

Descriptive passages:

Perfect figures—7, 13, 15, 148.

Narcissism—5, 13, 14.

Flagellation—58, 127, 129.

Cunnilingus—105.

Fellatio—106.

Two men have intercourse at the same time with one woman, one in her vagina and one in her anus. (Both standing and prone)—175.

Incest—175, 177.

Lesbianism—15, 57, 60, 61, 140, 142, 151.

Descriptive intercourse—9, 10, 30, 35, 53, 54, 128.

20. *"Flesh Is My Undoing"*, by Clyde Allison, No. NB1555.

Surrounded by lust-driven females at a weekend sex party, the protagonist takes time to make love to all guests, who trade partners in the continuous game of musical bed-springs, while endeavoring to crack a sex-badger racket.

Descriptive passages:

Perfect figure—27, 99.

Descriptive intercourse—27, 28, 48-50, 57, 68, 79, 99, 142.

Nymphomania—62, 79, 148, 179.

Rape—185.

Sadism—162, 183, 185.

21. *"Sex Circus"*, by John Dexter, No. NB1556.

In his new position as circus roustabout the central character learns his duty consists primarily in serving as

a stud for the female performers, all of whom have voluptuous figures and insatiable sexual appetites.

Descriptive passages:

One man is raped and beaten by two homosexual brothers—123.

Descriptive intercourse—32, 33, 70, 71, 83, 84, 132, 148, 150.

Sadism—92.

22. "*Malay Mistress*", by Clyde Allison, No. NB1557.

American soldier of fortune type enjoys a Chinese mistress, an oriental nurse and a French female smuggler. Mistress saves him from smuggler and they live happily ever after.

Heterosexual activity, including intercourse, described—7, 10, 16, 24-25, 30, 34, 39, 41, 48, 55, 57, 64, 84, 100, 119, 124, 132, 139, 164, 172, 183.

Man hires two young prostitutes to strip and lash each other with whips—83.

23. "*The Sinning Season*", by Tony Calvano, No. NB1561.

Johnny's north woods resort is invaded by hoodlums who bring along perverted girls in order to set up a bordello there. He kills hoods, saves his girl, who has been captured, and marries her.

Descriptive passages:

Defloration—6, 19.

Sadism—103, 106, 145.

Masochism—131.

Descriptive Intercourse—14, 17-19, 21-22, 44-46, 50-55, 75-80, 94-96, 113-115, 128-132, 137-138.

24. "*Sin Song*", by John Dexter, NB1562.

In this story of a two-dollar-a-fall prostitute's rise to become a "Sexpot" rock and roll singer, sexual activity is

accepted by the characters as being as commonplace as sitting down. Love is not an issue; neither is possible pregnancy. Sexual exhaustion is unheard of as the supersexed males, the nymphomaniac females, all with perfect, overdeveloped figures and glands, perform from various positions with little emotion except lust.

Descriptive passages:

Perfect figures—5, 15, 83, 112, 117.

Supersexed males—11, 21, 75, 113.

Nymphomania—18-19, 37, 112, 118.

Sadism—20, 92, 108, 182.

Homosexuality—116.

25. "Passion Slaves", by Andrew Shaw, No. NB1563.

This is a story of a teenage girl who flees the passion of her school teacher to become a prostitute in a large city. The girl, equipped with overdeveloped figure and drives, enjoys sexual activity so much she carries on her wanton adventures for either pay or play.

Descriptive passages:

Perfect figure—6, 14, 17, 22, 81, 93, 122.

Descriptive intercourse—22, 32, 96, 111, 112-113.

Nymphomania—13, 17, 21, 31, 84, 94, 126, 142, 149.

Incest—81.

Sadism—115.

Lesbianism—152.

Rape—152-153.

26. "The Sinful Ones", by Don Elliott, No. NB1564.

A young American goes to Rome to study architecture but learns about sex, continental style. His affair with a countess is shaken when he learns she is a lesbian.

Descriptive passages:

Twelve-year old girl is deflowered by her uncle—64.

Sadism—162.

Lesbianism—159-161, 166.

Descriptive intercourse—26-27, 37-38, 61-62, 66, 67, 98-102, 134, 175, 189.

27. "Lover", by Andrew Shaw, No. NB1551.

This story is concerned with a 19-year old male whore who develops his profession in the slums of New York and rises to the penthouses of Fifth Avenue. Sometimes he is paid for a brief house call and on other occasions makes a handsome fee by servicing several lusty females during all-night orgies.

Descriptive passages:

Perfect figures—16, 17, 35, 37, 68, 102, 144.

Descriptive nudity—18, 19, 20.

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Descriptive intercourse—21, 23, 39, 40, 71, 102, 104, 143.

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Defloration—24, 74.

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Man watches as two lesbians perform cunnilingus on each other—113-114.

Several couples watch stag movie while having an orgy—171, 180.

Homosexuality—189.

Cunnilingus—178, 179.

28. "Love Nest", by Tony Calvano, No. NB1559.

Married to a frigid woman, the hero seeks sexual satisfaction with other women.

Descriptive passages:

Perfect figure—12, 57, 79.

Descriptive intercourse—22-34, 39, 49, 61, 65, 70-72, 121, 138, 152, 176, 180.

29. "Passion Trap", by Don Elliott, No. NB1521R.

A college professor in love with a highly educated but frigid girl must sate his lust on a waitress. The frigid girl finally overcomes her condition in an illicit connection with the professor.

Defloration of 14-year old girl by her uncle—48.

Heterosexual activity, including intercourse—17, 38-42, 72-78, 83-86, 108, 121-122, 134-135, 172-173, 174, 189-191.

30. "Sin Cruise", by Don Elliott, No. NB1554.

Bachelor goes on Caribbean cruise with superabundance of willing females aboard. His sexual activities culminate in three-way relationship with two sisters. In the end, one withdraws and he marries the other.

Descriptive passages:

Two sisters and two men have alternating intercourse in one bed—57-59.

Defloration—39-40.

Heterosexual activity, including intercourse—25-28, 35-36, 54-56, 57-59, 75, 98-100, 108, 190.

One man alternates intercourse with two sisters—134-139, 160-164.

31. "Seeds of Sin", by Louis Lorraine, No. NB1560.

A college professor is making a survey of women's sex habits. He makes up for the frigidity of his wife by intercourse with the women he interviews.

Descriptive passages:

Rape—139.

Perversion—114.

Two nymphomaniacs rape a man—167.

Descriptive intercourse—18, 21, 59, 70, 103, 106, 118, 186.

Office Supreme Court, U.S.

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IN THE
Supreme Court of the United States

October Term, 1963

No. 449

A Quantity of Copies of Books, HAROLD THOMPSON
and ROBERT THOMPSON, dba P-K NEWS SERVICE,

Appellants;

vs.

STATE OF KANSAS.

Appellee.

On Appeal From the Supreme Court of the
State of Kansas.

REPLY BRIEF FOR THE APPELLANTS.

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REPLY BRIEF FOR THE APPELLANTS.

Statement.

1. The appellee concedes in the opening statement of its brief (p. 5) that appellants did present evidence through witnesses demonstrating that the books here in question do not exceed customary limits of candor in description of sex. The appellee discounts this uncontradicted testimony with the following statement:

"Intervenors did not present their witnesses as average members of the community. Three of their four witnesses held graduate degrees". Appellee's Brief, 5 (emphasis added).

There is, of course, more involved in the aforesaid statement than the mere attempt to diminish the effect

of the witness' testimony. Appellee appears unconcerned with the question of what is actually going on in the community, what society in fact tolerates in the depiction and representation of sex in books, newspapers, magazines, motion pictures, television and other related media of communication. Appellee would reduce the objective test of "contemporary community standards" to the subjective attitudes of the hypothetical "average man". However, the effect of the reading of a book on the average person is one issue. The question whether the book substantially exceeds societal limits of candor in description or representation of sex is a separate matter which as a matter of fact can hardly be answered by, or be dependent upon, the judgment of a theoretical "average member of the community".

2. The appellee makes no real attempt to justify the statutory test for obscenity, nor the test, approved on appeal, employed by the District Court [R. 17-18], nor the varied tests referred to by the court below [R. 40-41]. Instead, the appellee reminds this Court in its brief that whatever definition of obscenity is enunciated, "in substance" these enunciations "amount to the same thing". The essential test, according to appellee, is this: does the material deal with sex in a manner offensive to generally accepted standards of decency? Appellee's Brief, 5.

Plainly, the case herein, it is submitted, must be decided in the first place on the record made below. The District Court used the following operative standard for judging the alleged obscenity of the writings involved herein: "If the books in question showed to this Court that their dominant purpose was *calculated to effectively incite sexual desires*, and the Court further be-

believed that they would have this effect, then they are not entitled to the protection of the Amendment to the Constitution" [R. 17-18] (emphasis added). The appellee has made no attempt to support this standard for judging obscenity within the purview of First Amendment guarantees. See, Appellants' Brief 43-45.

Moreover, aside from the fact that appellee's improvised standard for judging obscenity, newly presented, omits all requirements relative to the corruptive effect of the material, it is not apparent, it is submitted, how the new standard is consistent with First Amendment requirements. "Indecency", standing alone, is clearly too broad and vague a term to make a valid censorship standard. "Indecent" may include anything from vulgarity or impropriety or unseemliness to unfitness or unbecomingness or indecorum. Such exquisite vagueness as appellee proposes for judging what the public shall or shall not read is clearly not a permissible standard in the area of free expression under the Constitution.

3. The appellee asserts that the books herein "constitute hard-core pornography". Appellee's Brief, 6. The appellee was not so firm in this opinion in its Motion to Dismiss the appeal herein. In the Motion to Dismiss, appellee stated that each of the books "may be classified as pornography, or at least bordering on pornography" (pp. 8-9) (emphasis added). The District Court did not place such appellation on the writings, asserting only that the "core" of the books "would seem to be that of sex, with the plot, if any being subservient thereto" [R. 39]. It is true that the court below was of the opinion that the books were "hard core pornography" and that "young G.I.'s from Fort Riley

—many of whom frequent Junction City—would be of the same opinion” [R. 41], but the court gave no indication of the standards to be used in judging so-called hard core pornography, and, indeed, contented itself with calling the books “obscene by the definition found in the Roth case, or by the definition found in the statute or by any other definition” [R. 41]. This “talismanic” approach to the books involved herein is clearly not in itself a valid reason, it is submitted, for denying the writings constitutional protection. See, *New York Times and Abernathy v. Sullivan*, October Term 1963, Nos. 39 and 40, opinion rendered March 9, 1964.

Because of the nature of appellee’s agitational argument on this issue, appellants discuss the question in more detail hereafter. It should be noted however that while appellee maintains the books herein have all the “attributes found in such pornography”, still one of the so-called attributes appears missing—“some of the four-letter words” are lacking in the writings. Appellee’s Brief 6. What appellee is really conceding is that the books herein do not even contain the racy language found in numerous comparable books dealing with sex and now customarily found and accepted in contemporary literature.

Appellee also insists that these paperback books have a standardized format from which appellee infers that they are “part of a mass-production industry, which has repackaged hard-core pornography and aimed it at a new and larger market”. Appellee’s Brief 6. What appellee is really admitting is that the books herein are not distributed nor sold clandestinely, and that appellee believes the circulation of the press under commercial auspices, especially a large portion of the paperback

industry, is equivalent to "the business of smut peddling" (Appellee's Br. 6). As appellants demonstrate hereafter, there is hardly any publisher or national distributor of writings dealing with sex who can hope to escape the supercharged name calling which appellee heaps upon the books herein.

4. Comparing an obscenity proceeding to a negligence case, appellee states that in both situations "a hypothetical man is used as the norm"; that this norm is "the man with average community attitudes"; that the trier of fact, as in negligence cases, "constructs the norm using the totality of his experience", from which it follows, that the trier of fact must be deemed in law to know what are the contemporary community standards in the depiction and representation of sex, and therefore "the state cannot be required to produce it" because evidence with respect to the question of whether writings substantially exceed limits of candor "is really in the nature of argument". Appellee's Brief, 6-7.

If appellants understand appellee's unusual construction accurately, it would appear that in any obscenity prosecution the only burden placed upon the State is to offer the writing in evidence. If this is all that is meant by requiring the State, before suppressing and burning a book, to prove that the book substantially exceeds contemporary community standards in depiction and representation of sex, then the "vigor" and "variety" of discussion of the problems of sex will clearly be dampened. See, *New York Times and Abernathy v. Sullivan*, October Term, Nos. 39 and 40, opinion rendered March 9, 1964.

The trier of fact in a negligence case may perhaps construct the "norm" of a "reasonably prudent man", but the trier is hardly prepared to render a valid judgment without proof of the essential elements of negligence. So, too, it may perhaps be possible for the trier of fact in obscenity proceedings to construct the "norm" of a "person with average sex instincts" (*United States v. One Book Called "Ulysses"*, 5 F. Supp. 183, D.C. N.Y. 182, 184, 1933), but the trier of fact cannot possibly know, without proof, whether the printed words in the book before him substantially exceed in description and representation of sex the candor expressed in all the writings and other media of communication freely circulated in the community. Clearly, the trier of fact must have *some proof* before the trier can render a rational judgment devoid of his own subjective predilections. The issue is not whether the trier of fact is "bound" to believe the proof adduced on the question of contemporary community standards; the real issue is whether the constitutional guarantees require that a book ~~be not~~ suppressed until the State proves by evidence and with convincing clarity that the writing substantially exceeds customary limits of candor in depiction or representation of sex. If no such proof is required, the distribution of all books dealing with sex will become a risky venture.

5. The appellee has also devised for the first time a new conception of the word "community" as used in the test for judging the obscenity of writings. It appears, according to appellee, that the word has no geographical connotations, but merely represents "an average of all the attitudes known by the trier to obtain in society at large". We are assured by appellee, that

"Roth, the Kansas statute, and the courts below" all employed the word "community" as the appellee now envisages it, "to denote not a geographical entity but an average of all the attitudes within the trier's experience". Appellee's Brief, 7.

As a result of the aforesaid, appellee insists that appellants have misstated the record in asserting that the trial judge applied the standards of Junction City, Kansas, but as appellants show hereafter it is the appellee who overlooks the record and there can be no question that the District Court made its decision on the basis of the said geographical entity. Indeed, the appellee has seemingly forgotten that in its Motion to Dismiss the appeal, appellee made the following statement: "The U. S. Supreme Court in *Manual v. Day* [370 U.S. 478], concludes the relevant 'community' under a federal statute is the nation. It seems reasonable to assume that the 'community' under a state statute would be the state." Motion to Dismiss, 9, n. 2. Appellee has therefore previously equated "community" with a geographical entity, and in *Manual*, Mr. Justice Harlan noted that constitutional problems might arise if a "lesser geographical framework" than a national standard were employed for judging obscenity under the federal statute. 370 U. S., at 488. See, Appellants' Brief, 50-54.

6. The appellee, in accordance with its view that no proof is required in an obscenity proceeding to show the extent of public acceptance, maintains that the decision maker in such cases may equally be a judge or a jury. Appellee has not sought to meet the fundamental constitutional issues presented on this aspect of the appeal. Appellants' Brief, 24-40. Since appellants ana-

lyze appellee's argument on this issue hereafter in the brief, it suffices at this point to note on appellee's own terms, that if under the Constitution a writing may not be suppressed unless it substantially exceeds "the various attitudes, current in the community" (Appellee's Brief, 7), then clearly it is arbitrary to deprive the representatives of the community from making the decision which so vitally affects the community.

7. The appellee asserts that "the Kansas statute is not a licensing or censorship scheme" because the seizure here was effected only after publication, and it was "designed to restrain further publication of the same material". Appellee's Brief, 7. But books illegally suppressed after their publication are as much the subject of constitutional protection, it is submitted, as those which are not permitted to leave the printing presses. *Lovell v. City of Griffin*, 303 U. S. 444, 452.

The appellee justifies the issuance of the search warrant by urging that the District Court scrutinized seven titles before him, and "concluding that these were probably obscene, he was inescapably drawn to the conclusion that the 'other Nighstand books' with virtually identical titles, named in the back of these seven, were exactly the same in nature". Appellee's Brief, 8. The failure of the appellee to concede the unlawfulness of such censorial activities by judicial decree gives concern as to the meaning which appellee ascribes to the terms "order, morality, and human dignity" appearing in its brief. Appellee's Brief, 10. Is it obscenity, or is it really unbridled, arbitrary and lawless censorship which "makes a frontal assault" on the foundations of order, morality, and human dignity?

Finally, appellee urges that the total delay from seizure to final decision "was sixteen days", which appellee maintains is "not excessive" when applied to material "claimed to have lasting, not periodical, value." Appellee's Brief, 8. It is true that sixteen days of suppression is not as long as sixteen hundred days of suppression, but it is suppression just the same. If the suppression is illegal, one moment of such suppression is too long. The validity of constitutional principles, it is submitted, should not be measured on a time basis.

I.

The Failure to Provide a Jury Trial for Determination of the Issue of Obscenity Renders the Statute Unconstitutional. Appellee's Arguments Fail to Meet the Constitutional Issues Involved (Appellee's Brief, 20-22).

The appellee avoids any discussion of the historical and legal material presented in Appellants' Brief, pp. 24-40. The fact is that appellee treats the question here as if no First Amendment issues were involved. As is evident from its entire brief, appellee assumes that since "obscenity" is purportedly outside the protection of the First Amendment guarantees, it follows that none of the questions here presented involve First Amendment guarantees. That, however, it is submitted, is placing the cart before the horse.

The question presented at this point of the discussion is this: Assuming it is attempted to suppress a writing as obscene, is the State constitutionally required to provide a jury trial for the determination of the question? In such posture of the proceedings, we deal only with a writing ordinarily protected from suppression by the provisions of the First Amendment. The writing

has not yet been found to be obscene; it still has the protection of all the constitutional guarantees; and the problem is who shall make the decision that it has no such protection. Thus, unlike similar issues involving adulterated food or gambling paraphernalia, First Amendment questions *are* involved when it is sought to suppress an alleged obscene book, without a jury determination.

Appellee sidesteps all questions of history (Appellants' Brief, 27-33) and the significance of the *Roth-Alberts* definition of obscenity with its inclusion of "contemporary community standards" (Appellants' Brief, 33-37). Refusing to meet the constitutional issues, appellee limits itself to a discussion of "policy." It is argued first that neither a judge nor jury may decide the issue of obscenity by their own "personal opinions." What the judge or jury must apply is their "knowledge of community attitudes," and since the judge "lives in the community, just as the jurors do," the judge knows "the attitudes of society at large as well as they do." It is urged that judges may even be more circumspect than juries in deciding whether a given book is obscene, reliance being placed on an article in the Harvard Law Review entitled *The Passive Virtues*. Appellee's Brief, 20-21.

With deference, it is submitted that the "mechanical jurisprudence" represented by the doctrine of "passivism" (Address, Walter E. Craig, Los Angeles Daily Journal, March 19, 1964, p. 5) is not applicable here. The provisions of the fundamental law are to be applied in the light of "the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government." *United States v. Classic*, 313 U. S. 299, 316.

It is therefore not sufficient to assert that the judge knows as much as the jurors do about community "attitudes." It is probable that most sociologists would agree with Professor Chafee that judges do not. Appellants' Brief, 37-38. But far more important is that our entire history shows the jury to have been a "barrier" against attempts by government-judicial as well as legislative and executive—to suppress the circulation of press and speech. The reason why a jury trial is required in obscenity proceedings is because history and the tenets of our constitutional system support such a position.

Moreover, it appears unduly arbitrary on the one hand to attempt to tighten obscenity standards by requiring that no writing be suppressed which the community tolerates, and at the same time withdrawing the right from the community through its representatives to make the awesome decision of final suppression of a communication.

The appellee argues that the jury trial guarantees of the Sixth and Seventh Amendments are not incorporated in the Fourteenth Amendment (Appellee's Brief, 21) and points to the decisions in *Chicago, R.I.&P.Ry. Co. v. Cole*, 251 U.S. 54 and *Fay v. New York*, 332 U. S. 261. The *Chicago, R.I.&P. Ry. Co.* case involved a negligence suit and the *Fay* case involved the constitutionality of a "blue ribbon" jury in a criminal action involving officials of a labor union. No First Amendment questions were presented in these cases. Whatever may be the ultimate decision by this Court on a squarely presented question of the incorporation of the jury guarantees of the Sixth and Seventh Amendments into the due process provisions of the Four-

teenth Amendment, the fact is that we deal here with a situation where the question of a right to trial by jury is inextricably entwined with the protective provisions of the First Amendment, and on that question appellee has made no answer.

Appellee finally urges that "community toleration is a constitutional standard," and that since judges in appellate courts may ultimately decide that a writing is constitutionally protected, it follows that a judge is as competent as a jury to decide whether a book exceeds contemporary community standards, from which it follows that a jury in obscenity proceedings is not constitutionally required. Appellee's Brief, 21-22.

Whether a writing exceeds customary limits of candor in description and representation of sex is a factual matter "entangled in a constitutional claim." *Manual Enterprises, Inc. v. Day*. Whether the issue is one of fact or of mixed fact and law, the issue must in the first instance be presented to the trier of the fact. The determination of who that trier of fact shall be is not dependent upon the ultimate right of a trial judge, or appellate court, to set aside the verdict of the trier upon legal or constitutional grounds. See, *Commonwealth v. Moniz*, 336 Mass. 178, 143 N. E. 2d 196 (1957); 338 Mass. 442, 155 N. E. 2d 762 (1959). If a jury trial is constitutionally required in obscenity proceedings, it is immaterial that in particular cases a jury verdict may be set aside or reversed by trial judges or appellate courts. To hold otherwise, would jeopardize the right to a jury trial in virtually all cases.

II.

The Statute, on Its Face and as Construed and Applied, Violates the Provisions of the First, Fourth and Fourteenth Amendments. Appellee's Argument That the Procedure Followed in This Case Is a Valid Method of Preventing the Distribution of Obscenity Is Without Basis in Law or in Fact (Appellee's Brief, 23-27).

Appellee makes very little effort to support the constitutional validity of the statute on its face, and as construed. See, Appellants' Brief, 41-47. Appellee states that its problem was "to follow the course marked off" by *Kingsley Books, Inc.* and to avoid the "pitfalls" of *Marcus*, Appellee's Brief, 23. It is submitted that appellee has done neither.

Did the magistrate read the material before issuing the search warrant here? Appellee states that the judge "scrutinized" seven of the thirty-one titles which were finally seized. Obviously, the judge did not read the seven titles in their entirety, but appellee relies on the use of the word "scrutiny" in the *Marcus* decision. Appellee's Brief, 24. Appellants submit that such grasp of a word out of the context of the *Marcus* decision is not sufficient support for its position.

Appellee states that the seven titles were in the judge's possession for three hours prior to the 45-minute hearing. That, however, is not the issue. Did the magistrate *read* the books in their entirety in order to determine the dominant theme of each of the books taken

as a whole? The record is very clear that he did not [R. 3, 19-20, 24].

Having "scrutinized" seven titles, the appellee insists that the magistrate was justified in issuing a warrant to seize all books issued by the same publisher. It is argued that the examining magistrate had "no reason to suspect that there might be a literary gem amongst this utterly crude ore" (Appellee's Brief, 25), and therefore, if the judge could reasonably infer that the books before him were "obscene, these others were probably also obscene" (Appellee's Brief, 24). Statements of this kind, it is submitted, are their own best refutation. See, Appellants' Brief, 48-49.

Other arguments presented by appellee on this issue are equally invalid. The procedures employed here clearly do not meet the standards enunciated in *Kingsley* and *Marcus*. Appellee appears to believe that these decisions authorize the use of contempt and seizure sanctions "to prevent further publication." Appellee's Brief, 26. Appellee, to say the least, misconceives the language of the decisions, and perhaps more importantly, the language of the applicable provisions of the Constitution.

III.

The Local Community of Junction City, Kansas Was Not an Appropriate Geographical Unit to Measure the Constitutional Protection Afforded the Books Involved Herein. Appellee Disregards the Record Made Below With Its Newly Improvised and Invalid Notion of the Meaning of Contemporary Community Standards (Appellee's Brief, 18-20).

Since appellee asserts that the standards of Junction City, Kansas were not applied, appellants turn to the record. At the opening of the trial, prior to the introduction of the books into evidence, appellee's counsel made the following statement:

" . . . The State proposes to put on no expert witnesses, inasmuch as the test, in our view, set out in the statute involved, to wit, Chapter 186, Session Laws 1961, Section 1, Subsection (b), permits or contemplates no expert witnesses of any kind, but rather contemplates that the Court will apply to a determination of the legal question of obscenity, his knowledge, both of the moral standards of the community and as to whether or not these books, in their impact upon the average citizen of the community, would be legally obscene, as heretofore discussed in this case on argument for motion to quash . . . " [Tr. B. 7, September 14, 1961].

The books having been placed in evidence, the State rested [Tr. B. 11]. On the argument with respect to appellants' demurrer to the evidence, counsel for appellee stated:

" . . . It has been previously stated in argument on motions in this case that the Court is—that the

Judge of this Court, Your Honor, if you please, is a resident of some substantial length of time in this community and is presently and was at all times pertinent to this case a resident of this community. We're speaking of the City of Junction City, or Geary County." [Tr. B. 18].

"We submit that the test as set out in Roth and included by act of our legislature in Chapter 186, Section 1 (b), is a test or standard that requires the Court to make a legal decision; in other words, to apply to these books the knowledge of the Court which it's entitled to do, of the standards of the community in which the Court lives and works, to determine in the Court's mind what is an average person in the community, because the State could never establish this by any stretch of the imagination." [Tr. B. 20-21].

Following argument, the Court called for a copy of the opinion in *Smith v. California* [Tr. B. 31] and then stated:

"The Court: The Court at this time will rule upon the intervenors' demurrer to the evidence of the State. The Court personally finds himself in complete agreement with the statement of Justice Black in the case cited by the intervenor, but unfortunately the Court does not feel that that is the law as set out in the majority decision, nor does the Court feel that the concurring opinion of Mr.

Frankfurter is controlling in this case, and I believe the case can best be summarized, or this particular motion can best be answered, by Justice Douglas [sic] in that case, who says that the state can rely upon the judge of the trial court as the conscience of the community, and based upon this, the demurrer will be overruled." [Tr. B. 31-32].

When then, the Court in its memorandum decision [R. 16-18] stated that it was using the "operative" test of incitement to "sexual desires", and the effect of the books under this test "on the average person residing in this community" [R. 17], it is submitted that it was Junction City, Kansas which the Court was using as the geographical community, and this too appears to have been the view of the court below with its reference to the "Young G.I.'s" who frequent "Junction City" [R. 41].

Since appellee has not discussed the question as presented on the record, appellants do not repeat here the discussion contained in their Opening Brief. See, Appellants' Brief, 50-54. Appellants do analyze in the Point which follows appellee's concept that "community standards are not an objective fact which the State must prove". Appellee's Brief, 16.

IV.

The Failure of the State to Offer Any Proof That the Books Substantially Exceed Contemporary Community Standards Renders the Statute as Construed and Applied Unconstitutional. The Appellee's Argument Essentially Subverts the Concept of Contemporary Community Standards and Relegates the Determination of the Issue of Obscenity to the Subjective Predilections of the Trier of the Facts (Appellee's Brief, 15-20).

The appellee suggests that the word "community" as it appears in the *Roth* test for judging obscenity does not denote a national standard nor a state standard.

If we follow appellee's logic, it appears first that a trier of the facts in an obscenity proceeding will approach the question of obscenity as a trier of the facts approaches the question of negligence in a negligence action. In a negligence case, the trier of the facts constructs "a hypothetical person to be used as a norm", to wit, a "reasonable prudent man". In obscenity cases, according to appellee, the hypothetical man will be "the man with average community attitudes". Thereupon, "if the material deals with sex in a manner offensive to the representative man, then the trier should find it legally obscene". Appellee's Brief, 15-16.

Aside from the vagueness of this ultimate test devised by appellee, it should be initially noticed that there is much greater possibility of agreement among ordinary people on the issue of negligence as to the care expected of a reasonable man than there is on the literary and psychological problems involved in obscenity proceedings.

How does the trier of fact construct the hypothetical person envisaged by appellee? According to appellee,

the trier consults "his own experience as a member of the community", Appellee's Brief, 16. What does this mean? It means, again according to appellee, that the trier decides from "his experience as a member of the community, what he thinks the average person's response to this material would be". Appellee's Brief, 17-18. What experience does the trier rely on in determining the average person's response to the material? The trier distills all the trier knows "about the attitudes of people of all kinds". Appellee's Brief, 20. Where is such trier's knowledge derived? His knowledge is derived, according to appellee, from the experience the trier has gained "from family, travel, school, military service, mass media and business". Appellee's Brief, 19.

While appellee maintains that it is not urging that the trier under its concept may impose his personal standards, the fact is that this in effect is precisely what appellee is attempting to "construct". The appellee is really urging that the trier should look to his own personal community, to the community where the trier lives and works, and that such personal community should be the community whose standards are to measure the constitutional protection to be afforded all speech and press. Distillation of opinion from such a limited community, largely built by the trier's own predilections, is no more than a reflection of the trier's own subjective opinions.

It is because appellee is unwilling to accept that the "community" in our society far exceeds the community of any single individual, that it so strongly argues against a geographical concept. Moreover, if by community standards, we mean no more than the personal community of the trier of the fact, then it is understandable why appellee argues that no amount of uncon-

tradicted proof that a book does not exceed limits of candor in description of sex in the nation, or even the state or local subdivision thereof, binds the trier of the facts.

But it cannot be the rule, it is respectfully submitted, if the constitutional guarantees of speech and press are to be preserved, that books may be suppressed because they offend the circle in which Judge Fletcher in Junction City, Kansas travels, any more than if they offend the circles in which twelve individual jurors travel. The "community" is society in general, a population reflecting "many different ethnic and cultural backgrounds". *Manual Enterprises, Inc. v. Day*, 370 U. S. at 488. That community transcends the personal community of any individual.

The problem of who shall be the decision-maker in any obscenity proceeding is different from the problem of how the decision shall be made. The decision-maker should be a jury for reasons implicit in a self-governing society and because a jury from the community will be a more "sensitive tool" in determining the issue of community toleration. But no jury can possibly know the limits of candor in description of sex contained in literature, newspapers, magazines, and all media of communication and their psychological consequences, or the vast changes in tolerance which are taking place in these areas, without some evidence to enlighten them. To assert that a single individual judge sitting in a courtroom in Junction City, Kansas can be given a book to read and without any further evidence, decide that such book substantially exceeds "contemporary community standards" is to flaunt reality. While appellee may vigorously deny it, its arguments here amount to no more than a plea for a return to the days of *Hicklin*.

V.

The Books Herein Are Not Obscene and Are Entitled to the Protections of the First Amendment. Appellee's Arguments Demonstrate the Dangers to Free Circulation of the Press Under Vague Standards for Judging the Obscenity of Writings (Appellee's Brief, 10-15).

"It was precisely at the time when the development of science and civilisation was leading to the proper estimate of witchcraft that the ferocity of the persecution of witches reached its height. We may say the same to-day about obscenity. The old sex taboos are dissolving. We are beginning to face openly the facts of sex with a degree of intelligence and frankness which even a quarter of a century ago was impossible. That new honesty and sincerity itself stirs up the persecutorial fanaticism of the descendants of the witchfinders."

Havelock Ellis, *The Revaluation of Obscenity in On Life and Sex* (Mentor ed., 1957), 193.

The appellee avows that "Comstockery is dead" (Appellee's Brief, 10), but its argument, it is submitted, fails to prove that it is. Appellee heaps abuse upon the books herein, calling the writings "hard-core pornography", and their circulation "smut peddling", reaching this conclusion by a plain use of the discredited *Hicklin* test and by unsupported allegations obviously intended as a substitute for facts. The uncontradicted testimony of expert witnesses which appear in the record are totally disregarded [R. 28-34], and it is contended that the books in this case "fit the Roth rationale perfectly". Appellee's Brief, 11. But, of course, this was not the view of the Solicitor General in *Roth*

whose principal concept of hard-core pornography was "large numbers of black and white photographs, individually, in sets, and in booklet form, of men and women engaged in every conceivable form of normal and abnormal sexual relations and acts." *Roth v. United States*, October Term, 1956, No. 583, Brief for the United States, 37. We deal here only with books without illustrations.

Perhaps the most revealing statement in appellee's brief is the following: "There is no kinship here with the erotica written by Lawrence, Joyce, O'Hara, Miller, or even Wallace or Métilious". It appears, therefore, that *Lady Chatterley's Lover* by D. H. Lawrence, *Ulysses* by James Joyce, *Ten North Frederick* and *A Rage to Live* by John O'Hara, *Tropic of Cancer* and *Tropic of Capricorn* by Henry Miller, *The Chapman Report* by Irving Wallace and *Peyton Place* by Grace Metalious are all constitutionally protected material. Appellee implicitly concedes that these books are neither obscene nor hard-core pornography. Yet these books in their constant use of four-letter and scatological words and vernacular describing sexual organs and activities; in their frank and continuous discussions and clinical presentations of sex relations; in their presentation of themes of lesbianism, homosexuality, cunnilingus, fellatio, sadism, masochism and rape, exceed in candor the descriptions and representations of sex contained in the books herein.

The reasons therefore for appellee's attack upon the books herein is that they are not as well written as the aforesaid writings (in some cases, even this may be doubted); that a broad segment of the population may understand these books while they may not appre-

ciate the more literate style of the aforementioned writers; and that if the books of Lawrence, Joyce, Miller, *et al.*, arouse "sexual desires", at least only the literate will be so affected, not the "average" man and woman.

Appellants submit that appellee's arguments reflect a regrettable lack of faith in the sound judgment and hardihood of the people generally. In an era when problems relating to sex in all its manifold manifestations are so frankly discussed in the Kinsey Reports, in marriage manuals, on television, in the theatre, in advertising, in novels, in every conceivable media of communication, it is simply irrational to assert that the common man or woman may not read some particular book which offends the State. In *Grove Press, Inc. v. Christenberry*, 276 F. 2d 433, 438, Judge Clark said of Lawrence's *Lady Chatterley's Lover*:

"In actuality his thesis here is only that pressed continuously in the modern marriage—counseling and doctors' books written with apparently quite worthy objectives and advertised steadily in our most sober journals and magazines."

See also, *The Kama Sutra of Vatsyayana* (E.P. Dutton & Co., 1962); *The Perfumed Garden of the Shaykh Nefzaoui* (G.P. Putnam's Sons, 1964); Li Yui, *Iou Pu Tuan* (Grove Press, Inc., 1963). On the value of open discussion of sex relations, see the trial of Dr. Eustace Chessier for his publication of the book *Love Without Fear* in Craig, *Suppressed Books* (1963) 97-103.

Appellee asserts that the books herein "nourish erotic fantasies in the reader's mind", that the books are marked by "a daydream quality" which, it is alleged, is a chief characteristic of "obscenity" and "pornography".

But appellee never offered proof to support these assertions in the trial, and the uncontradicted testimony given by expert witnesses [R. 28-34] shows that each of the books contains a plot and theme, and in some cases a very obvious moral, and that none of the books exceed in candor of language or description of sex the novels found in the library in Junction City and elsewhere [R. 26-28]. Daydrams and erotic fantasies arise in the world under a wide variety of circumstances. If such dreams and fantasies are to be removed, it is probably the world which will have to be effaced.

Conclusion.

Appellee, it is submitted, has failed to justify the suppression of the books herein. Appellee's arguments, however, do point to the need for reconsideration of the legal standards affecting the circulation of books dealing with sex. Appellee's arguments fortify the view that books which deal with sex should have the same rights as all other books enjoy under the First and Fourteenth Amendments to the Constitution of the United States: Appellants' Brief, 64-72.

Respectfully submitted,

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